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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 472

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
Petitioner,

vs.

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Respondent.

## PETITION FOR CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

## SUPPORTING BRIEF.

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:
W. E. HENDRIX,
R. G. DRAPER.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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vs.

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Respondent.

## PETITION FOR CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

### SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, Louise Camp, Administratrix of the Estate of Ervin Camp, deceased, sued respondent, Trustee for the St. Louis-San Francisco Railway Company, in the United States District Court for the Western District of Tennessee, for the wrongful death of Ervin Camp, seeking, under the provisions of the Federal Employers' Liability Act (U. S. C. A., Title 45, Secs. 51-60), to recover as damages the loss sustained by her as widow and by their three minor children (R. pp. 1-8).

In the District Court a jury verdict for $35,000.00 was rendered in favor of petitioner, respondent's motion for a new trial was overruled and judgment for this amount was entered in favor of petitioner (R. pp. 592-3). On appeal to the Circuit Court of Appeals for the Sixth Circuit, that court reversed the case on a single ground—failure to give a special instruction tendered by respondent dealing with the measure of damages—and remanded the case for a new trial (R. pp. 603-16). The opinion of the court appears at page 604 of the record and is reported under the style of **Thompson v. Camp**, 163 Fed. 2d 396.

Camp, a switchman, was injured the night of April 26, 1945, in the switchyards in Memphis, Tennessee, when he alighted from a moving cut of cars that was being "kicked" into a switch, and fell into a hole permitted by respondent to be adjacent to its tracks. There was substantial evidence that respondent was negligent in failing to furnish Camp a safe place to work; in permitting the existence of the hole near its tracks where switchmen had to alight; in failing to light its switchyards properly; and in kicking cars over rough and uneven ground on which switchmen were forced to alight instead of shoving them in so as to enable switchmen to alight from standing cars (R. pp. 128, 165, 187, 223, 243, 300, 315, 375, 399, 407, and passim).

On June 2, 1945, Camp and respondent's claim agent were both informed by Dr. M. B. Hendrix, the regular surgeon of respondent's employees, who was employed by an association of respondent's employees jointly financed and controlled by respondent and its employees, and the physician who attended Camp, that Camp was "OK, he could go back to work" (R. p. 65).

Both Camp and respondent's claim agent relied upon this statement of Dr. Hendrix, and as a result Camp exe-

cuted a release in consideration of the payment to him of $500.00, which approximately covered the wages he would have received during the time lost (R. p. 453).

Thereafter Camp returned to work, but was unable to perform his duties, and on June 17, 1945, collapsed while on duty and died as a result of his earlier injuries (R. p. 521).

Petitioner sought to set aside the release on the ground of mutual mistake, and to recover for the death of Camp caused by respondent's alleged negligence (R. pp. 6, 7).

Receiving the entire case from the District Judge, the jury found, in an advisory capacity on the equitable issue, that the release was executed by mutual mistake, and returned a general verdict in favor of petitioner for $35,000.00 on the common-law issues of liability and damages (R. p. 575). Both aspects of the verdict were approved by the District Judge, who himself found that there was a mutual mistake sufficient to avoid the release (R. pp. 592-3).

The statement of the case made by the Circuit Court of Appeals in its opinion is accurate. That court, agreeing with the District Judge that the release should be avoided by reason of mutual mistake, found that respondent was liable to petitioner and that the jury was correctly instructed upon all questions of liability. It reversed on the sole ground that the District Judge failed to read to the jury a special instruction on the measure of damages tendered by respondent under the following circumstances:

At the close of the evidence respondent presented a written request that the Court instruct the jury:

> "Defendant's Special Request No. 2.
>
> "Should you find the plaintiff is entitled to damages, it becomes my duty to charge you how to determine

those damages. The damages are limited to such amount as you may deem proper for conscious pain and suffering suffered by the plaintiff's intestate, Ervin Camp, and to such loss as results to the plaintiff and their children because they may have been deprived of a reasonable expectation of pecuniary benefits by the death of said Ervin Camp. In determining the amount of such pecuniary benefits of which they may have been deprived you may take into consideration age, health, expectancy of life of the deceased, his earning capacity, his character, his mode of treatment towards his family and the amount he contributed from his earnings to their support. In determining the amount of pecuniary benefit which the plaintiff and her children may have lost you may not include any amount as contributions which the children would have received after they have attained the age of twenty-one years since it is not presumed that they would receive any pecuniary benefits from the deceased thereafter. You should also take into consideration the fact that all persons do not live to the age of expectancy, that this is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminish in the future.

"After you have determined the amount of damages under these rules, you should diminish the same for any contributory negligence which you find the said Ervin Camp to have been guilty of should you so find, the damages being diminished in accordance with the rules I have heretofore given you.

"And finally, it is your duty in determining the amount of damages, if any, due the plaintiff to reduce the same to their present cash value since it is considered that a lump sum of money in hand at the present time is worth more than a sum of money payable over a period of future years. It is accordingly your duty to reduce such damages to their estimated present cash value" (R. pp. 569-70).

The Court, as required by Rule 51 of the Federal Rules of Civil Procedure, informed counsel of its proposed action upon this request, saying:

> "The defendant's special request number 2, on the question of damages, I believe will be amply covered in the Court's general charge, and therefore the same is refused" (R. p. 537).

No objection or exception was made at that time by counsel for respondent, who merely stated:

> "I take it we can reserve decision as to that until the general charge is given, to see whether it is given. It is impossible to tell, in fact, until it is given" (R. p. 537).

The District Judge in the general charge instructed the jury:

> "You may take into consideration in estimating the damages the conscious pain and suffering, mental and physical, of the plaintiff's decedent, Ervin Camp, which he experienced during the time intervening between the time he was injured and the time of his death, if you find from a preponderance of the evidence that he experienced any conscious pain and suffering, mental or physical, during that time.
>
> "Further, in estimating the damages recoverable you should allow the plaintiff such sum as in your judgment, under the proof will be just and reasonable compensation for the pecuniary loss plaintiff has sustained, if any, by reason of the death of the said decedent, Ervin Camp. In estimating the present cash value of plaintiff's pecuniary loss, which is the amount you award, you should consider the age of the decedent, together with his capacity for earning money, his disposition to contribute, to care for, and to furnish his wife money, as shown by the evidence. You should consider in arriving at the amount of your verdict decedent's expectancy as shown by the mortality tables, and also the expectancy of the life of plaintiff, as go-

ing to the question of how long she might reasonably have expected to receive financial aid and support from her deceased husband" (R. pp. 561-62).

After the giving of the general charge the following occurred with respect to requested instruction number 2:

> Counsel for Defendant: "We except to the charge on damages insofar as it failed to embody certain portions of the defendant's special request number 2 to the effect that the jury should not consider or does not have to consider that a man will live to his full expectancy, and that it should take into consideration that he may not, particularly in a hazardous occupation; they should take into consideration every element, such as the fact that the plaintiff might remarry, or that the—that a child may not live to maturity, or that she may die before her expectancy and other elements of a like nature.
>
> Mr. Armstrong: I am willing for you to read his special instruction on that.
>
> The Court: That is the purpose of this little conference right at this time, to call the attention of the Court to anything that resembles error in the Court's charge. You are excepting; do you concede to the rereading?
>
> Mr. Turner: No, I am excepting, and I am not agreeing that certain portions of the charge or certain other submitted charges may be now read or reread, except to state my exception that it over-emphasizes the matter of damages to the plaintiff here. I am entitled to that exception" (R. pp. 568-69).

The Circuit Court of Appeals held that the District Judge committed prejudicial error in failing to give respondent's requested instruction number 2, and on this single ground reversed the case and remanded for a new trial (R. pp. 615-16).

## STATEMENT AS TO BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered August 11, 1947 (R. p. 603). A seasonably filed petition for rehearing (R. p. 617) was overruled by the court on October 7, 1947 (R. p. 643).

## QUESTIONS PRESENTED.

The Circuit Court of Appeals reversed the judgment of the District Court for alleged error in failing to give an instruction requested by respondent with respect to the measure of damages.

Important questions raised by this action of the Circuit Court of Appeals, which should be settled by this Court, are:

I.

Under Rule 51 of the Federal Rules of Civil Procedure, what is the correct practice in regard to objecting to the charge of the Court and the Court's failure to give a requested instruction, and did respondent properly object to the failure of the District Judge to give special instruction number 2?

II.

Whether the Circuit Court of Appeals failed properly to apply in a civil case the "harmless error statute" (Sec. 269 of the Judicial Code as amended) by reversing the judgment of the District Court for a technical error not affecting the substantial rights of the parties?

A subsidiary question presented by the record is:

III.

Was the District Court in error in failing to give respondent's special instruction number 2?

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Rule 51 of the Federal Rules of Civil Procedure imported a new feature into the federal practice by permitting a party at the close of the evidence to "file written requests that the court instruct the jury on the law as set forth in the requests" and by requiring the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury." That Rule further precludes a party from assigning "as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

The scope and application of Rule 51 has not been the subject of opinion by this Court. The Circuit Court of Appeals for the Sixth Circuit erroneously applied this Rule by reversing for failure to give a requested instruction, although counsel for respondent had rejected an offer of the court to read this instruction and had thus in effect withdrawn it. Moreover, counsel did not distinctly state the matter to which he objected and the grounds of his objection; this could only have been done by redrafting the requested instruction, omitting all features of it which had been covered in the general charge, retendering it as revised and excepting to any refusal to grant the retendered request. This error should be corrected and this important question of federal practice and procedure, arising in innumerable trials, should be settled.

2. The Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court for a technical error not affecting the substantial rights of the parties. It thus failed to apply the "harmless error statute" (Sec.

269 of the Judicial Code as amended, 28 U. S. C. A. Sec. 391) in a civil case in a manner consonant with the decision of this Court in **Kotteakos v. United States**, 328 U. S. 750 (1946). As to the construction of the "harmless error statute," the decisions of this Court in civil cases do not fit into a coherent pattern and there is confusion and contradiction among the Circuit Courts of Appeals. See authorities cited in brief, infra, pp. 24-27.

The clarification of the application of the "harmless error statute" in civil cases, specifically pretermitted by this Court in the **Kotteakos case**, is a matter of highest importance to orderly procedure and substantial justice. The instant case offers an opportunity to this Court to undertake such clarification and to settle the confusion and contradiction in the Circuits.

## PRAYER.

Wherefore, your petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals of the Sixth Judicial Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled and numbered on its docket "Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor, Defendant-Appellant, v. Louise Camp, Administratrix of the Estate of Ervin (Irving) Camp, Deceased, Plaintiff-Appellee, No. 10362," to the end that said case may be reviewed and determined as provided in Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Sec. 347), and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court and the judgment of the District Court of the Western Division of the Western District of Tennessee be affirmed, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## THE OPINIONS OF THE COURTS BELOW.

No formal opinion was delivered by the District Court (see Record pp. 589-91). The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed August 11, 1947, and appears at pages 604-16 of the record. It is reported under the style of **Thompson v. Camp**, 163 Fed. 2d 396. Upon denial of the petition to rehear, October 7, 1947, the Circuit Court of Appeals rendered no opinion.

## JURISDICTION.

See Statement as to Basis of Jurisdiction, Petition, supra, p. 7.

## STATEMENT OF THE CASE.

See Summary Statement of Matters Involved, Petition, supra, pp. 1-6.

## SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Sixth Circuit erred in reversing the judgment of the District Court and remanding the cause for a new trial for alleged error of the District Court in failing to give respondent's requested instruction number 2.

This was error for

1. Respondent, under Rule 51 of the Federal Rules of Civil Procedure, did not properly object to the failure of the District Court to give requested instruction number 2.

2. There was no error by the District Court in failing to give such requested instruction.

3. The failure of the District Court to give such requested instruction was, at worst, technical error not substantially affecting the rights of the parties and no ground for reversal under the "harmless error statute" (Sec. 269 of the Judicial Code as amended).

## ARGUMENT.

### UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHAT IS THE CORRECT PRACTICE IN REGARD TO OBJECTING TO THE CHARGE OF THE COURT AND THE COURT'S FAILURE TO GIVE A REQUESTED INSTRUCTION, AND DID RESPONDENT PROPERLY OBJECT TO THE FAILURE OF THE DISTRICT JUDGE TO GIVE SPECIAL INSTRUCTION NUMBER 2?

Rule 51 of the Federal Rules of Civil Procedure provides:

> "Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

That part of the Rule obligating the District Court to inform counsel of its proposed action upon submitted requests, prior to argument to the jury, is a new feature imported into federal practice. This Court has not authoritatively construed its scope or effect. It is our submission that notwithstanding any indication of proposed action, the District Judge is free until the time the case is submitted to the jury to change or supplement his charge,

and that exception can only be taken to his final action. See **Palmer v. Miller,** 145 Fed. 2d 926 (C. C. A. 8, 1944); **Terminal R. Ass'n of St. Louis v. Staengel,** 122 Fed. 2d 271 (C. C. A. 8, 1941), Cert. den. 314 U. S. 680. In the latter case, the Circuit Court of Appeals for the Eighth Circuit resolved the difficulty presented by argument of counsel to the jury on the assumption that the law would be declared in one way by the judge, when in fact it was later declared in another way, by holding that under such circumstances counsel should call the attention of the court to the situation and request the right to reargue—a sound view which we urge upon this Court.

Counsel for respondent in the instant case rejected the offer of the court to give requested instruction number 2 after the jury was charged, and in effect asserted a claimed right to stand on his exception (R. pp. 568-69), thus in effect withdrawing this requested instruction. Respondent therefore cannot complain of the court's action in this respect, because the court had a right then to give the instruction and was willing to do so, and only failed to take this action because of the objection of respondent. An opinion by the Court dealing with this subject would clarify the federal practice.

Moreover, Rule 51 precludes a party from assigning as error "the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Counsel for respondent did not object to the court's failure to give requested instruction number 2; he objected to the meagerness of the charge in that it did not embody certain portions of the requested instruction number 2. As pointed out by the Circuit Court of Appeals, many of the features of this requested instruction were covered by the general charge:

> "Damages in such a case 'should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased,' and 'that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only.' * * * This general rule was covered by the Court's charge. In addition, the Court charged that in estimating the present cash value of appellee's pecuniary loss, the jury should consider the age of the decedent, his capacity for earning money, his expectancy as shown by the mortality tables and also the expectancy of the widow, and his disposition to contribute, to care for and to furnish his wife money" (R. p. 614).

A substantial part of requested instruction number 2, therefore, having been covered in the general charge, the court cannot be put in error for refusing to accept the entire instruction, because a party cannot assign as error the refusal of an instruction to which he has not a right to the full extent, as stated and in its precise terms. **Fowler v. Brantly,** 14 Peters 318 (1840); **Beaver v. Taylor,** 93 U. S. 46 (1876); **Rio Grande Western Ry. Co. v. Leak,** 163 U. S. 280 (1896); **Chicago, G. W. R. Co. v. Robinson,** 101 Fed. 2d 994 (C. C. A. 8, 1939), cert. den. 307 U. S. 640.

The only way that proper objection could have been made would have been for requested instruction number 2 to have been redrafted, those parts of it which had been covered by the general charge eliminated and the remainder retendered, and if the retender was refused, then objection made to the refusal to give the revised instruction.

Counsel for respondent, having failed to do this and having rejected an offer of counsel for petitioner and the court to have his requested instruction number 2 given, and having not distinctly objected—having in effect withdrawn his

request—failed to comply with the Rule. Here, too, it is important that the federal practice be spelled out by this Court.

**It Was Not Necessary for the Matters Dealt With by Requested Instruction Number 2 Which Were Not Covered by the General Charge to Be Explained to the Jury.**

The Circuit Court of Appeals found that only two of the propositions contained in this requested instruction were not covered by the general charge. To use the language of that Court:

> "Appellant's Special Request No. 2 asked that the jury be instructed to also consider decedent's health, that all persons do not live to the age of expectancy, that such is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary, and that the reasonably to be expected contributions may vary or diminish in the future * * *" (R. p. 614).

This portion of the instruction deals with matters so obvious and so peculiarly within the knowledge of a jury that it would have been a work of supererogation specifically to call them to the jury's attention. As was said by Judge Sanborn in **Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.**, 114 Fed. 133 (C. C. A. 8, 1902), these facts were "a part of the common knowledge and experience of mankind, and it is not error to refuse to insert in a charge to a jury truisms which are a part of the common knowledge and experience of all men who have arrived at years of discretion" (p. 144).

The only other phase of this special instruction that the Circuit Court of Appeals found the general charge did not deal with was that part which told the jury that it should

not include any contributions which the children would have received after they attained the age of twenty-one. The general charge did not refer to the children, but limited the recovery to contributions reasonably to be expected by the wife. There is nothing in the complaint and there is nothing in the record to suggest that there was claimed as an element of damage any contribution the decedent might in the future make to any child after that child reached maturity. The issue was not in the case. On this subject the Circuit Court of Appeals said:

> "Although the children are not specifically mentioned, the charge refers several times to the pecuniary loss of the 'plaintiff.' Plaintiff was not the widow individually, but was the widow as Administratrix of her husband's estate" (R. pp. 615-16).

It is true that in that paragraph of the charge dealing with damages the court said:

> "Further, in estimating the damages recoverable you should allow the plaintiff such sum as in your judgment, under the proof will be just and reasonable compensation for the pecuniary loss plaintiff has sustained, if any, by reason of the death of the said decedent, Ervin Camp" (R. p. 562).

It is also true that the plaintiff was Mrs. Louise Camp, Administratrix. However, in defining "the pecuniary loss plaintiff has sustained" the court further said:

> "You should consider the age of the decedent, together with his capacity for earning money, his disposition to contribute, to care for, **and to furnish his wife money**, as shown by the evidence." (Emphasis supplied. R. p. 562.)

It seems entirely clear from this that the court submitted to the jury as an element of damage only the support furnished by the decedent to his wife, and in effect elimi-

nated any contributions he might make to his children either as adults or minors. It seems difficult to put any other construction on this charge. Moreover, the exception of counsel for respondent was not to the refusal to give the requested instruction but to the refusal to embody certain portions of it in the general charge. There is in that exception no objection of any kind to the failure of the general charge to state that contributions to the children could be considered only during their minority. In this view, therefore, the error in the general charge as to the measure of damages, if any, was an error against the petitioner in limiting the contributions to those made to the wife and excluding as an element any contributions made to the children even during minority.

WHETHER THE CIRCUIT COURT OF APPEALS FAILED TO APPLY IN A CIVIL CASE THE "HARMLESS ERROR STATUTE" (SEC. 269 OF THE JUDICIAL CODE AS AMENDED) BY REVERSING THE JUDGMENT OF THE DISTRICT COURT FOR A TECHNICAL ERROR NOT AFFECTING THE SUBSTANTIAL RIGHTS OF THE PARTIES?

Section 269 of the Judicial Code as amended (28 U. S. C. A., Sec. 391; Act of Feb. 26, 1919, c. 48, 40 Stat. 1181) provides:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

**A Technical Error, Not Affecting Substantial Rights, Formed the Basis of Reversal by the Circuit Court of Appeals.**

The requested instruction of respondent refused by the District Court dealt only with certain elements of the measure of damages (R. pp. 569-70; the request is set out supra, pp. 3-4). Obviously the refusal of the instruction could not have had any influence upon whether the jury found for petitioner or respondent. The only influence the refusal could possibly have had would have been on the amount of the verdict. It seems clear, however, that the amount of the verdict is entirely consonant with what it might have been if the jury had made its finding after the requested instruction had been given. The District Judge having had his attention again brought to this subject by the motion for new trial (R. pp. 577-88) approved the verdict (R. p. 591). The Circuit Court of Appeals nowhere in its opinion intimates that the verdict is in any wise excessive or would be excessive if the charge had been meticulously exact. Petitioner's decedent suffered intense physical and mental pain for a period of approximately six weeks. It would seem a conservative statement to say that this suffering alone prior to his death would warrant a verdict of at least $10,000.00. This leaves only $25,000.00 of the verdict to be attributed to the damage suffered by his dependents. At the time of his death Camp was thirty-three years of age, and, before his injury, was in perfect health. Decedent's expectancy was 33.2 years and his widow's expectancy 35.3 years (R. p. 285). At the time of decedent's death one of his children was between twelve and thirteen years of age and one between nine and ten, so that there remained for them approximately nine and twelve years of minority (R. p. 58). There was a posthumous child only five months old at the time of the trial (R. p. 58). Decedent himself was frugal and abstemious (R. p. 59). His earnings averaged

about $3,000.00 a year (R. p. 59), and all of that amount was necessary for the support of his wife and only two children (R. p. 59). The cost of a life annuity of $3,000.00 per annum with no return value for a man forty years of age is $74,520.00 (R. p. 287). When all factors are considered—decedent's expectancy and his widow's longer expectancy; his earnings; the cost of an annuity; the fact that he would be obligated to support one minor child for nine, another for twelve, and the third for twenty-one years—it seems clear that even a jury which gave full weight to the fact that decedent's obligation to support his children ceased at their majorities, and to the uncertainties of life, would have been well warranted in awarding damages equal to the amount found in this case ($35,000.00).

There is therefore presented by this record a case where, it is submitted, it affirmatively appears that the refusal of the District Court of respondent's requested instruction was harmless error.

The uniform refusal of courts to reverse even though there is affirmative error in the charge on damages, when it plainly appears the verdict is not excessive, is bottomed upon the fact that in such cases the error is necessarily harmless. **Coast S. S. Co. et al. v. Brady,** 8 Fed. 2d 16 (C. C. A. 5, 1925); **United Verde Copper Co. v. Jordan,** 14 Fed. 2d 299 (C. C. A. 9, 1926); **Overland Const. Co. v. Sydnor,** 70 Fed. 2d 338 (C. C. A. 6, 1934); **Philadelphia & W. C. Traction Co. v. Kordiyak,** 171 Fed. 315 (C. C. A. 3, 1909); **Atwater v Whiteman,** 41 Fed. 427 (D. Minn., 1890); **Albert Miller & Co. v. Wilkins,** 209 Fed. 582 (C. C. A. 7, 1913); **Chicago House Wrecking Co. v. Birney,** 117 Fed. 72 (C. C. A. 8, 1902), cert. den. 187 U. S. 642.

Certainly, this record does not present a case where such refusal can be considered as affirmatively prejudicial.

Even if we are mistaken in our insistence that there is an affirmative showing that the error was harmless because the concededly proper elements of damage justified the jury's verdict, it can hardly be contended that there is, contrariwise, an affirmative showing that the amount of the verdict was attributable in slightest degree to the failure to give the requested instruction. There was no affirmative inclusion of any improper elements of damage. At most there was a failure affirmatively to exclude certain elements not proper to be considered. In the event that a jury is told to consider improper elements of damage and the resulting verdict is so large as to indicate that these elements were considered, that may no doubt make an affirmative showing of prejudice. It is conceivable that when a proper request for the exclusion of improper elements of damage is refused, and the resulting verdict is so large as to indicate that the amount would have been less if these elements had been excluded, this may be considered an affirmative showing of prejudice. In the instant case, however, the verdict is entirely consistent with the consideration by the jury of only the proper elements of damage and with its rejection of all improper elements. The Circuit Court of Appeals in its opinion in this case, finding error in the refusal of the District Court to give a requested charge, mechanically characterized that error as "prejudicial" (R. p. 616). While the court does not refer to any "presumption" of prejudice in reaching its conclusion, a basis for its finding can be found only in its indulgence of such a presumption, as it has done, in terms, in other recent cases. See **Evansville Container Corp. v. McDonald**, 132 Fed. 2d 80 (C. C. A. 6, 1942), in which, referring to an erroneous charge, the court said that "there is a presumption that it was prejudicial" (p. 85); **Majestic v. Louisville & N. R. Co.**, 147 Fed. 2d 621 (C. C. A. 6, 1945), where the court said that "in jury trials erroneous rulings embodied in instructions are presumptively injurious and furnish grounds

for reversal unless it affirmatively appears they were harmless" (p. 627).

A technical error, not affecting substantial rights, was therefore the basis of reversal by the Circuit Court of Appeals of the judgment of the District Court, and its action squarely raises the important question presented here as to the proper scope and construction of the "harmless error statute" in a civil case.

## This Court Has Recently Settled the Construction of the "Harmless Error Statute" in Criminal Cases.

Recognizing the confusion and contradiction among the Circuit Courts of Appeals in construing and applying the "harmless error statute," this Court in **Kotteakos v. United States**, 328 U. S. 750 (1946), for the first time went into the legislative history of the Act and fully construed it as applied to a criminal case.[1] It rejected both the view that

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1 Exhaustive study of the legislative history of the "harmless error statute" discloses that this Court, in the **Kotteakos case**, considered that history in detail. Discussion in that case, however, was focused upon the purpose of the "harmless error statute" as a device for eliminating reversals for technicalities in criminal cases. The legislative history discloses that the purpose of the statute was to emasculate harmless error in civil as well as in criminal cases. This is fully disclosed by the reports of the committees of the American Bar Association which originally proposed the legislation. Cf. **American Bar Association Reports**, Vol. 31, p. 543; Vol. 33, p. 543; Vol. 34, p. 62; and the brief filed by that Association before the Committee on the Judiciary, House of Representatives, which read in part:

> "So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in consideration in an appellate court of a writ of error, judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below, and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law, that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision of law was real, and that if it was erroneous in some detail the error did not affect the result. * * * It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him on the merits." **Reforms in Legal Procedure**, Hearings Before the Committee on the Judiciary, House of Representatives, 62nd Cong., p. 40 (1912); **American Bar Association Reports**, Vol. 35, pp. 624, 627.

That Congress was equally desirous of correcting civil abuses is evidenced by H. R. Rep. No. 611, 62d Cong., 2d Sess., Vol. 3. In this report

there is a presumption that all error is harmless, and the view that there is a presumption that all error is prejudicial, holding that "the general object was simple, to substitute judgment for automatic application of rules" (p. 760). Technical errors are to be disregarded unless the complaining party shows they have affected his substantial rights, but errors whose natural effect is to affect a litigant's substantial rights place upon the one claiming under the Act the burden of sustaining the verdict. If the Court can be sure that the error did not influence the jury or had only a slight effect, the verdict and judgment should stand.

Put another way, when the error is merely technical this does affirmatively show without the aid of any presumption that the substantial rights of the parties were not affected; where the substantial rights of the parties are affected, this affirmatively shows, without the aid of any presumption, that the error was prejudicial.

The **Kotteakos case** is confined both in its holding and in its discussion to the effect of the statute in criminal cases. "The statute in terms makes no distinction between civil and criminal causes. But this does not mean that the same criteria shall always be applied regardless of this difference" (p. 762). No civil case is either cited or referred to in the opinion. There is the same confusion in civil cases as existed in criminal cases before the opinion in the **Kotteakos case**, and the same need for clarification in such cases; indeed, it seems to be a permissible inference from

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Hon. John W. Davis, Chairman of the Committee on the Judiciary of the House of Representatives, pointed out the need for legislation as follows:

> "* * * in (R. R. Co. v. O'Reilly, 158 U. S. 334) the Supreme Court holds that an error is presumed to be prejudicial until the contrary appears, and in (Cunningham v. Springer, 204 U. S. 647) that an error is presumed to be harmless until the contrary is made to appear. It is the purpose * * * of the present bill to enact * * * that in the consideration in an appellate court * * * judgment shall be rendered upon the merits * * * without presuming that any error which may appear has been of necessity prejudicial to the complaining party."

the opinion in the **Kotteakos case** that the Court limited the discussion to criminal cases because it preferred to wait until a typical civil case was presented in which there could be further clarification and application of the statute.

**Supreme Court Cases.**

"The divergent views which have been expressed in the various circuit courts of appeals as to the effect of the Act of 1919" were noticed by this Court in **United States v. River Rouge Improvement Co.**, 269 U. S. 411 (at p. 421) (1926), which was the first case to be decided after the passage of the Act. The Court added "that since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties" is ground for reversal "unless it appears from the whole record that it was harmless" (p. 421). The inclusion of the words "as well as before" seemed to some to intimate that the Act had not changed pre-existing law. While in that case the Court did not refer to presumptions, it did cite **Fillippon v. Albion Vein Slate Co.**, 250 U. S. 76 (May 19, 1919), which was decided before the passage of the Act and in which it had been stated that "in jury trials erroneous rulings are presumptively injurious" (p. 82).

The first case decided after the passage of the Act which which mentioned the subject of presumption was **Berger v. United States**, 295 U. S. 78 (1935), in which the purpose of the Act was declared to be "to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed" (p. 82). The Court returned to the subject in **McCandless v. United States**, 298 U. S. 342 (1936), and stated that the Act did "not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it **affirmatively** appears from the whole

record that it was not prejudicial" (pp. 347-48). There is no mention in the **McCandless case** of a presumption, but that case does again cite with approval the **Fillippon case**, in which before the passage of the Act this presumption was distinctly enunciated.

The interpretation placed by the Circuit Courts of Appeals upon the **Berger** and **McCandless** cases has probably been the reason for the confusion and contradiction among those courts. They have apparently treated the **Berger case** as enouncing that there is a presumption that error is harmless, and the **McCandless case** as holding the contrary. In any event, the **McCandless case** has been frequently cited as authority that error is presumed to be prejudicial, no matter what the nature of the error, and most of the Circuit Courts of Appeals have treated the question as one of presumption, a basis for decision now rejected by this Court in the **Kotteakos case.**

**Confusion and Contradiction Among Circuit Courts of Appeals.**

There have been cited above (p. 21) recent cases from the Sixth Circuit holding that every error is presumed to be prejudicial. In both of these cases the **Fillippon case** was cited and relied upon.

Striking illustrations of the effect of the construction placed by the Circuit Court of Appeals on the **McCandless case** are found in the change of attitude of the Eighth and Ninth Circuits after the decision of that case. The Eighth had said, in **Goldstein v. United States**, 63 Fed. 2d 609 (1933), that since the enactment of the harmless error statute "an error is not presumed to be prejudicial" (p. 614), and had added, in **Valley Shoe Corp. v. Stout**, 98 Fed. 2d 514 (1938), that "since the enactment of that statute the rule of this Court has been that unless an appellant can

show from the entire record the denial of some substantial right, there will be no reversal" (p. 520). After the opinion in the **McCandless case** the Eighth returned to the subject in **Fort Dodge Hotel Co. v. Bartelt,** 119 Fed. 2d 253 (1941), saying that since the enactment of the statute "this Court * * * has ruled that unless an appellant can show from the entire record the denial of some substantial right, there will be no reversal." And added: "The Supreme Court has stated the rule differently in McCandless v. United States * * *" (p. 259).

The Ninth Circuit, from which the **McCandless case** had gone to this Court (74 Fed. 2d 596), in **Lynch v. Oregon Lumber Co.,** 108 Fed. 2d 283 (1939), stated that prior to the passage of the "harmless error statute" "the established rule was that the burden was on appellant to show error, and that error shown, was presumed to be prejudicial unless the contrary was affirmatively shown by the record" (p. 285). It further stated that in the **McCandless case** it had held that the Act changed the previous rule, but that this Court had held in **United States v. River Rouge Improvement Co.,** supra, "that the amendment had not changed the rule that a presumption of prejudice arose upon a showing of error" (p. 286), but that in holding otherwise it had followed the **Berger case,** and concluded:

> "Since McCandless v. United States, 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205, is latest in time, it must be taken as overruling Berger v. United States, supra, and as establishing the rule that if error is shown, then there should be reversal 'unless it **affirmatively** appears from the whole record that it was not prejudicial' " (p. 286).

The First and Fifth Circuits categorically state the rule in terms of generalized presumption, holding that there is a presumption that error is prejudicial. See **Gaillard v. Boynton,** 70 Fed. 2d 552 (C. C. A. 1, 1934), and **Farris**

v. **Interstate Circuit, Inc.**, 116 Fed. 2d 409 (C. C. A. 5, 1941).

The conflict among the other Circuits centers upon the question as to whether the burden is upon the appellant to show that an error is prejudical, or upon the appellee to show that it is harmless. Cf. **United States v. Johnson,** 129 Fed. 2d 954 (C. C. A. 3, 1942), and **Andrews v. United States,** 108 Fed. 2d 511 (C. C. A. 4, 1939). But see **Worcester v. Pure Torpedo Co.,** 127 Fed. 2d 945 (C. C. A. 7, 1942). The Tenth Circuit, on the other hand, has expressed conflicting views. See **Little v. United States,** 73 Fed. 2d 861 (C. C. A. 10, 1934) and **Scritchfield v. Kennedy,** 103 Fed. 2d 467 (C. C. A. 10, 1939).

**Confusion Should Be Clarified in Civil Cases as Was Done by Kotteakos Case in Criminal Cases.**

We rely upon the confusion and contradiction among the Circuits in civil cases, and upon their categorical statement that the test is a generalized presumption—a test rejected by this Court in the **Kotteakos Case**—as a basis for the granting of the writ in the instant case. The Sixth Circuit in reversing this case must necessarily have applied its rule that error is presumed to be prejudicial. Indeed, it is difficult to see how there could have been any reversal except by such "an automatic application of rules." It seems fairly "sure that the error did not influence the jury, or had but very slight effect" (328 U. S. at p. 764), because the verdict could be firmly based upon correct elements of damage. Thus no substantial right of the respondent could have been invaded; the error, if any, was technical and could only be the basis for reversal if a presumption is indulged that it influenced the result. A typical case, therefore, is presented in which to illustrate the effect of the statute "to substitute judgment for automatic application of rules"—a case in which

the error, if any, is "technical" and is not such that "its natural effect is to prejudice a litigant's substantial rights" (p. 760).

Not only the application but the construction of the statute in civil cases, a question which was reserved in the **Kotteakos Case**, should be decided. As was intimated in that case, the attitude toward harmless error may well be more liberal in a civil than in a criminal case.[2] Indeed, in a civil case there would seem to be no reason why, when a clearly correct result had been obtained, there should be any necessity for reversal. In the instant case it is not necessary to go that far. Concededly, under the record as it now stands a verdict for the plaintiff was proper; even the amount of the verdict is not subject to attack as excessive under a technically correct charge. Obviously, under such circumstances the error, if any, was harmless.

## WAS THE DISTRICT COURT IN ERROR IN FAILING TO GIVE RESPONDENT'S SPECIAL INSTRUCTION NUMBER 2?

Although not urged as an important question justifying the granting of the petition for certiorari herein, there is necessarily presented by the record the question of whether or not there was **any** error in the action of the District Court in refusing respondent's requested instruction number 2.

To save the rights of petitioner with respect to this question, if it becomes material, it is briefly submitted:

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2 As to the distinction between criminal and civil cases and the possibility of a different rule in the two classes of cases, see **Glasser v. United States**, 315 U. S. 60 (1942); **Johnson v. United States**, 318 U. S. 189 (1943); **Bollenbach v. United States**, 326 U. S. 607 (1946); **Bihn v. United States**, 328 U. S. 633 (1946). (Decided before the **Kotteakos case.**) See **Fiswick v. United States**, ... U. S. ..., 91 L. Ed. 183 (1946); **Ballard v. United States**, ... U. S. ..., 91 L. Ed. 195 (1946); **United Brotherhood v. United States**, ... U. S. ..., 91 L. Ed. 705 (1947). (Decided after the **Kotteakos case.**)

The requested instruction itself was not technically accurate and its refusal was justified on this ground. Reference therein to reduction of "the amount of the damages" to "their present cash value" confused "damages" with "earnings" and rendered the request inaccurate (R. pp. 569-570). Reference therein to future variation of petitioner's decedent's earnings and contributions (R. p. 570) dealt with the possibility of their **diminishing**, when an accurate charge should have dealt likewise with the possibility of their **increasing**.

## CONCLUSION.

Because of the importance of the questions presented, especially that involving the application and construction of the "harmless error statute" in civil cases and the clarification of conflict among the Circuits, it is submitted that the petition should be granted, and the erroneous action of the Circuit Court of Appeals for the Sixth Circuit corrected.

Respectfully submitted,

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Petitioner, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.

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CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

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LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,

Petitioner,

vs.

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,

Respondent.

No. 472

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## RESPONSE TO PETITION FOR CERTIORARI

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EDWARD P. RUSSELL,
Twenty-ninth Floor Sterick Building,
Memphis, Tennessee,
Attorney for Respondent
Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor.

OF COUNSEL:

COOPER TURNER, JR.
CANADA, RUSSELL & TURNER.

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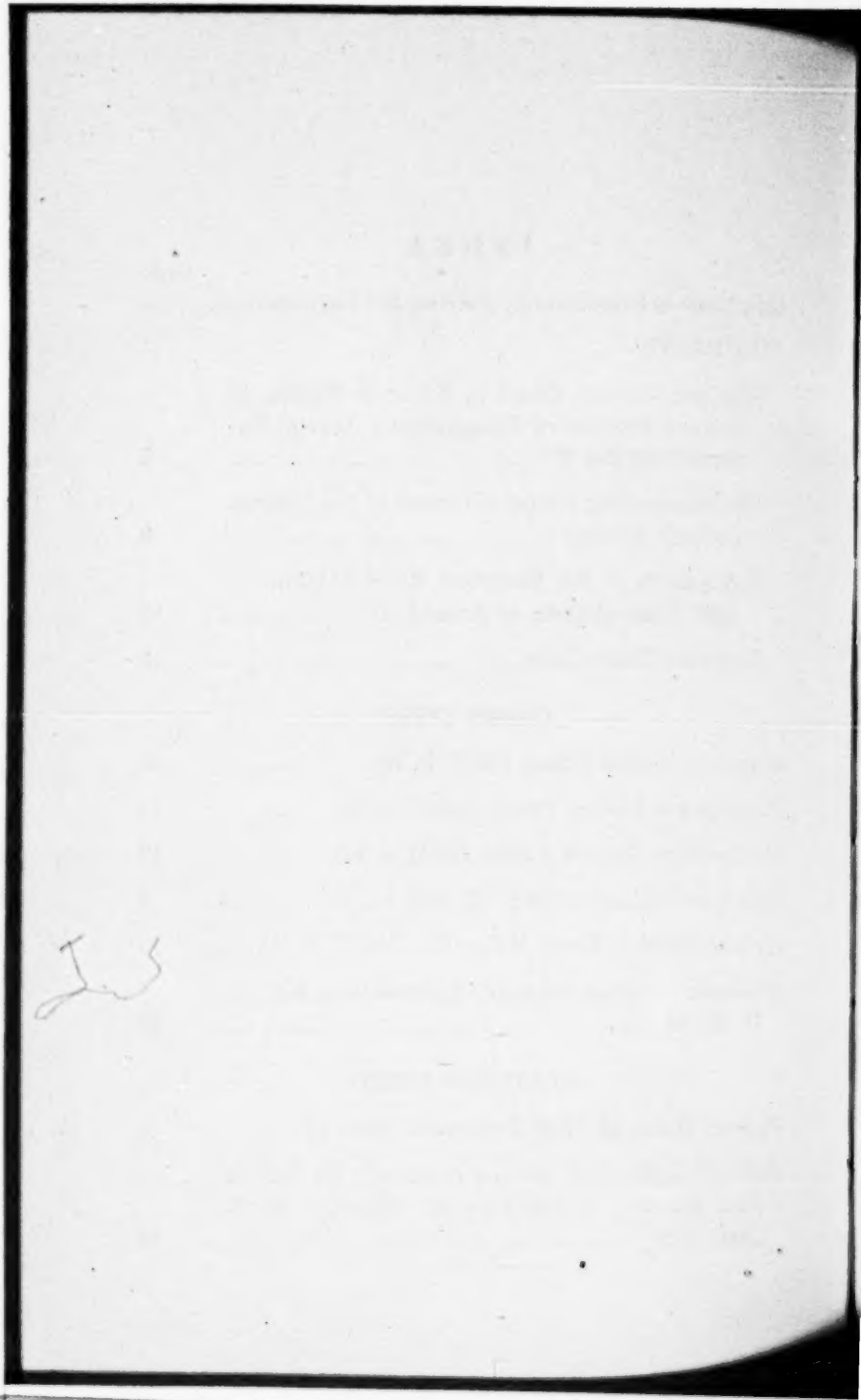

IN THE

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No.____

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## RESPONSE TO PETITION FOR CERTIORARI

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition for certiorari states that important questions are raised by the action of the Circuit Court of Appeals for the Sixth Circuit in reversing the judgment of the trial court and remanding for a new trial and states those questions to be:

I.

"Under Rule 51 of the Federal Rules of Civil Procedure, what is the correct practice in regard to objecting to the charge of the Court and the Court's failure to give a requested instruction, and did respondent properly object to the failure of the District Judge to give special instruction number 2?

II.

"Whether the Circuit Court of Appeals failed properly to apply in a civil case the 'harmless error statute' (Sec. 269 of the Judicial Code as amended) by reversing the judgment of the District Court for a technical error not affecting the substantial rights of the parties?

III.

"Was the District Court in error in failing to give respondent's special instruction number 2?"

We submit that upon examination there is no substantial question presented by the petition for certiorari.

**WAS THE DISTRICT COURT IN ERROR IN FAILING TO GIVE A PORTION OF RESPONDENT'S SPECIAL REQUEST NUMBER 2?**

Petitioner states that she recognizes that this question would not justify the granting of her petition, but takes the position that the request should not have been granted. In view of petitioner's attitude the matter will not be discussed at length, but it is important to point out that there is no question presented on the record as to whether the *entire* special request number 2 should have been given. The question is as to whether a certain portion of that request should have been given. Petitioner

has treated the matter as presenting the question as to whether the entire request should have been given, but as stated, that question is not presented on the record. It is important to bear the distinction in mind when considering the reasons given by petitioner for asserting that the denial of the request was proper and also when considering the exceptions which were taken by respondent in the trial court.

It is also important when considering the reasons given by the Circuit Court of Appeals for reversing upon this ground.

Special request number 2 was as follows:

> "Should you find the plaintiff is entitled to damages, it becomes my duty to charge you how to determine those damages. The damages are limited to such amount as you may deem proper for conscious pain and suffering suffered by the plaintiff's intestate, Ervin Camp, and to such loss as results to the plaintiff and their children because they may have been deprived of a reasonable expectation of pecuniary benefits by the death of said Ervin Camp. In determining the amount of such pecuniary benefits of which they may have been deprived you may take into consideration age, health, expectancy of life of the deceased, his earning capacity, his character, his mode of treatment towards his family and the amount he contributed from his earnings to their support. *In determining the amount of pecuniary benefit which the plaintiff and her children may have lost you may not include any amount as contributions which the children would have received after they have attained the age of twenty-one years since it is not presumed that they would receive any pecuniary benefits from the deceased thereafter. You should also take into con-*

*sideration the fact that all persons do not live to the age of expectancy, that this is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminish in the future.*

"After you have determined the amount of damages under these rules, you should diminish the same for any contributory negligence which you find the said Ervin Camp to have been guilty of should you so find, the damages being diminished in accordance with the rules I have heretofore given you.

"And finally, it is your duty in determining the amount of damages, if any, due the plaintiff to reduce the same to their present cash value since it is considered that a lump sum of money in hand at the present time is worth more than a sum of money payable over a period of future years. It is accordingly your duty to reduce such damages to their estimated present cash value."

R. 569, 570.

This request was submitted before the Court's general charge was given and at that time the Court stated that he thought the substance of the request would be given in the general charge and therefore the request would not be given.

R. 537.

The Court, however, when giving the general charge, failed to give certain portions of the special request number 2 and following the giving of the general charge the following occurred:

"COUNSEL FOR DEFENDANT: We except to the charge on damages insofar as it failed to *embody certain portions* of the defendant's special request number 2 to the effect that the jury should not consider or does not have to consider that a man will live to his full expectancy, and that it should take into consideration that he may not, particularly in a hazardous occupation; they should take into consideration every element, such as the fact that the plaintiff might remarry, or that the—that a child may not live to maturity, or that she may die before her expectancy and other elements of a like nature.

MR. ARMSTRONG: I am willing for you to read his special instruction on that.

THE COURT: That is the purpose of this little conference right at this time, to call the attention of the Court to anything that resembles error in the Court's charge. You are excepting; do you concede to the re-reading?

MR. TURNER: No, I am excepting, and I am not agreeing that certain portions of the charge or certain other submitted charges may be now read and reread, except to state my exception that it overemphasizes the matter of damages to the plaintiff here. I am entitled to that exception."

**R. 568, 569.**

The above proceedings are quoted in the petition for certiorari, but the petition fails to quote the last remarks of the trial Judge. Following the quoted discussion the trial Judge said:

"I will give you the benefit of an exception on that. I will stand on the Court's charge on damages. I think to go into all those details is unnecessary in charging the jury on damages."

**R. 570.**

The Court will see from the foregoing proceedings that the question presented is not whether the entire request number 2 should have been given, but only whether that portion in italics should have been given.

In support of her position that it was not necessary for the trial Judge to give the requested portion of special request number 2, petitioner says that it presented merely matters with which everyone was familiar and which were peculiarly within the knowledge of a jury and that it was unnecessary to call them to the jury's attention. There are many occasions in charging a jury when it is deemed advisable and necessary for the protection of one or the other parties to call to the jury's attention matters with which ordinarily they would be familiar. It is not so much a question as to whether they are familiar with such matters, but it is done for the purpose of insuring the fact that those matters are brought to their attention so that they will not be overlooked during their consideration of the verdict.

This is of particular importance where evidence of annuity tables and mortality tables is admitted. It is doubly so when as in this case the trial court admits evidence of the price for which an insurance company would sell an annuity policy or contract. Much stress is put upon such evidence during the trial of the case and it is important that the jury should not lose sight of the fact that the tables of mortality and similar tables are only averages.

This is of further importance in cases such as this where the future earnings and future contributions are considered. A jury is prone to give undue weight to such evidence.

Likewise it was important that the jury be told that contributions to the children would not run past their majority. The issue of reasonably to be expected contributions to the decedent's family was in the suit. The contributions which a person may reasonably expect to receive may be considerably different from the contributions which he has the right to receive under the law. Many parents contribute substantially to the support of their adult children. The jury might well have supposed that they could include such contributions in their verdict unless they were told that there was such a limitation.

With respect to this point petitioner takes the position that the general charge did not refer to a loss sustained by the children and did refer to the decedent's disposition to furnish his wife money.

It is clear, however, as pointed out by the Circuit Court of Appeals, that the general charge told the jury that they should determine the pecuniary loss which the plaintiff had sustained. The plaintiff, of course, was the administratrix and the pecuniary loss sustained was that which the widow and children had sustained. Such a recovery was sought by the complaint and insofar as the reference in the charge to furnishing the decedent's wife money is concerned, the petitioner's evidence was that the money was furnished her by decedent for the support of the entire family which included the children all of whom were present in court and all of whom were made the subject of extensive evidence.

Petitioner also says that the trial Court was correct in refusing to give this portion of special request num-

ber 2 because special request number 2 in its entirety was erroneous in that a portion of it referred to "the amount of the damages" being reduced to their present cash value rather than the amount of earnings. This portion of the request was not embodied in the portion covered by the exceptions. That portion was substantially given by the general charge and there was no reason to except on that basis.

In considering whether this portion of the special request number 2 should have been given it must also be remembered that the Circuit Court of Appeals did not reverse this case solely because of the failure to give this portion of special request number 2, but did so particularly in connection with the fact that the trial Judge had admitted in evidence testimony as to what a life insurance company would sell an annuity for. It was respondent's position that this evidence was erroneously admitted because it was irrelevant and did not bear upon any of the issues in the case. The Circuit Court of Appeals in its opinion said:

> "When coupled with a proper instruction on the measure of damage, as hereinafter pointed out, such a ruling is not erroneous."
>
> R. 614; 163 Fed. 2d, 403.

The Circuit Court of Appeals then goes on to consider this special request, and its action in reversing the case for failure of the trial Judge to give the request or so much thereof as was excepted to cannot be divorced from the fact that the trial Judge's action in admitting the evidence referred to was held proper only in the event such an instruction were given.

## DID RESPONDENT PROPERLY OBJECT TO THE DISTRICT JUDGE'S ACTION?

It seems clear that the Court's action in failing to give the portion of special request number 2 which is under discussion was erroneous and the question is then presented as to whether the respondent properly objected to that failure.

Petitioner claims for this question undue importance in stating that a serious question as to practice under Rule 51 of the Federal Rules of Civil Procedure is involved. We submit that no such important question is involved.

That rule is as follows:

> "INSTRUCTIONS TO JURY: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto *before the jury retires to consider its verdict,* stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The substance of this rule simply is that one objecting to the Court's failure to give an instruction must do so before the jury retires to consider the verdict and in doing so must distinctly bring to the Court's attention the basis of the objection.

We submit that this rule was fully complied with. The request was submitted in writing before the general charge was given. After the charge was given counsel for respondent distinctly stated the basis of respondent's objections to the failure of the Court to give certain portions of the special request number 2. Petitioner would place upon respondent the duty at that time of handing to the Court a written request embodying only the portion of the special request with which the objections were concerned. This would have been a useless procedure because the Court already had that portion of the special request in writing. All that was necessary was to state to the Court that its charge had failed to include those matters and to state to the Court the basis for the objection. This was done and it is clear from the record that the Court fully understood the issue then presented and not only understood it but took the definite position that the Court's charge was clearly correct and that such matters as these were unimportant and the jury was not concerned with them.

On Page 15 of the petition for certiorari counsel states that the Court cannot be put in error for refusing to accept an entire instruction a portion of which was covered by the general charge. This question is not involved since it clearly appears from the record that respondent was not complaining of the Court's failure to give the entire request, but was complaining merely of the Court's failure to give a certain portion of it, which was not covered by the general charge, and since that portion was already submitted in writing and was definitely and clearly pointed out, there was no necessity for any further action on the part of the respondent.

Petitioner also makes the point that the Circuit Court of Appeals found that the general charge did not deal with the fact that the jury should not include contributions to the children after they had reached majority, and that no exception was taken with respect to that portion of the special request covering this phase of the law. The portion of the request to which the exceptions went was certainly pointed out to an extent sufficient to acquaint the trial Judge with the matters complained of. As a matter of fact specific reference was made in the exception to the fact that the charge did not sufficiently point out a number of elements which included the fact that a child might not live to maturity or that the widow might remarry and other elements of a similar nature. All that the rule requires is that the trial Judge be fully acquainted with the objection which is being made. It is impossible to read this record and reach any conclusion other than that the trial Judge in this instance was fully acquainted with the objections which were being made and concluded after considering them that they should be overruled.

## APPLICATION OF THE "HARMLESS ERROR STATUTE" (Section 269 of the Judicial Code as amended).

Here again petitioner is attempting to urge upon this Court the granting of her petition for reasons alleged to be of importance where actually the question presented has been many times decided by this Court.

Section 269 of the Judicial Code as amended (28 USCA, Sec. 391; Act of February 26, 1919, Ch. 48, 40 Stat. 1181) is as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions *which do not affect the substantial rights of the parties.*"

Petitioner says that there is presented by this record a case where it affirmatively appears that the refusal by the District Court to give the requested instruction was harmless error and then states that even if mistaken in this position, it can hardly be contended that there is an affirmative showing that the refusal was prejudicial, and takes the position that under the statute the burden is upon respondent to show that the refusal was harmless.

We submit that petitioner is in error in both positions.

Petitioner says that there is a conflict between the decisions of the various Circuits Court of Appeal in their application of this statute in civil cases which should be resolved by this Court as petitioner avers was done in criminal cases in the case of *Kotteakos v. United States*, 328 U. S. 750 (1946).

This Court has several times construed the application of this statute in civil cases:

*United States v. River Rouge Co.*, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339;
*Williams v. Great Southern Lbr. Co.*, 277 U. S. 19, 48 S. Ct. 417, 72 L. Ed. 761;
*McCanless v. United States*, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

The McCanless case was decided in 1936. It can hardly be said to be of ancient vintage. The opinion was by Mr.

Justice Sutherland who a year before had written the opinion in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 which is relied upon by petitioner.

The opinion of the Court in the McCanless case leaves no doubt about the proper construction of the statute. The Court in that case said:

> "In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U. S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761."
>
> 298 U. S. 347.

If there is any divergence between the opinions of the Circuit Courts of Appeal as to the application of this statute in civil cases, it would seem to be unjustified in view of the clear language of the Court in this opinion and it is hardly likely that a further opinion upon the subject would clarify a rule which is already clearly expressed.

Under this rule it is clear that this statute has no application in the instant case because certainly it does not affirmatively appear from the entire record that the

Court's refusal to give the requested portion of special request number 2 was harmless. It may be that some individuals would have rendered the verdict which was rendered in this case regardless of whether the requested instructions were given, but whether this Court or some other Court or some juror would have so acted is not the test. The test instead is whether the action complained of might reasonably be thought to have influenced the jury in reaching their verdict. It is clear that the refusal to give this request may have seriously influenced the jury in reaching their verdict and likewise it is clear that this was a matter which touched upon substantial rights of the parties. It was not, as counsel would indicate, a mere technical matter, but it was a matter of substance. Petitioner says it was a technical matter because petitioner would have reached the same verdict or possibly because petitioner thinks the jury would have reached the same verdict even if the requested charge had been given. That as indicated is not the test.

This point is clearly brought out in the case relied upon by petitioner, Kotteakos v. United States, 328 U. S. 750. In that case the Court said:

> "and the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision."
>
> 328 U. S. 764.

Again the Court in that opinion said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment

was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

328 U. S. 765.

That is exactly the rule laid down by the Court in the McCanless case, and when we apply that rule to the instant case it is clear that the error cannot be said to be harmless for regardless of what one as an individual may feel he would have done as a juror, it still remains that we cannot with fair assurance, after considering the entire proceeding, say that the judgment was not substantially swayed by the failure to give this requested charge, and that being true, it is impossible to say that substantial rights were not affected.

We submit therefore that there is no merit in the petition and the same should be denied.

Respectfully submitted,

EDWARD P. RUSSELL,
Twenty-ninth Floor Sterick Building,
Memphis, Tennessee,
Attorney for Respondent,
Frank A. Thompson, Trustee for the
St. Louis-San Francisco Railway Company, Debtor.

OF COUNSEL:

COOPER TURNER, JR.
CANADA, RUSSELL & TURNER

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IN THE

# Supreme Court of the United States

October Term, 1947

FRANK A. THOMPSON, Trustee for the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR,
Petitioner,

VS.

LOUISE CAMP, Administratrix of the Estate of Ervin (Irving) Camp, deceased,
Respondent.

No. 517

## PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF.

EDWARD P. RUSSELL,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee,
Attorney for Petitioner.

COOPER TURNER, JR.
CANADA, RUSSELL & TURNER,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee,
Of Counsel.

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Can the administratrix of a claimant under the Federal Employer's Liability Act who received certain known physical injuries and who settled his claim against his employer after his physician had advised him that he was all right and could go back to work although the claimant himself knew that his

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Where a claim is made for personal injuries and a dispute exists as to liability and a settlement is made and a release signed which states not only that the liability is disputed but that the injured party releases the tort feasor "from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent," can the release subsequently be set aside on the ground of mutual mistake of fact when it developes that the admittedly known injuries which were then thought to have been healed were not in fact and subsequently such injuries caused his death? ..... 22

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IN THE

# Supreme Court of the United States

October Term, 1947

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FRANK A. THOMPSON, Trustee for the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR,

Petitioner,

VS.

LOUISE CAMP, Administratrix of the Estate of Ervin (Irving) Camp, deceased,

Respondent.

No._____

---

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

SUPPORTING BRIEF.

---

*TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:*

## SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner, Frank A. Thompson, Trustee for St. Louis-San Francisco Railway Company, Debtor, was sued in the United States District Court for the Western District of Tennessee by respondent, Louise Camp as administratrix of the estate of her deceased husband, Ervin Camp. The complaint sought a recovery for the wrongful death of Camp under the provisions of the Federal Employer's Liability Act (USCA, Title 45, Sections 51-60) of the damages alleged to have been sustained by the respondent as the widow and by their three minor children (R. 1-8).

The complaint sets forth that Camp was injured on April 26, 1945, through the negligence of petitioner and that a settlement of his claim was made with him by petitioner on June 2, 1945, for the sum of $500.00 and that subsequently on June 17, 1945, he died as the result of the injuries received on April 26, 1945. The complaint alleged that the settlement was the result of fraud and of mutual mistake of fact and sought to rescind the settlement and at the same time to recover damages for the alleged wrongful death.

The answer of petitioner denied the charges of the complaint and asserted the validity of the release and settlement.

The trial Judge submitted two special issues to the jury, one as to whether the settlement was the result of fraud, and the other as to whether it was the result of mutual mistake of fact, and instructed the jury that if they answered either issue "Yes," they should then proceed to determine the issues of negligence and damages.

The jury answered the issue as to fraud in the negative and the issue as to mutual mistake of fact in the affirmative and returned a verdict against the petitioner in favor of the respondent for $35,000.00.

The trial Judge approved the jury's verdict on both special issues and approved the general verdict and entered judgment thereon, and overruling petitioner's motion to set aside the jury verdict and for judgment notwithstanding that verdict.

On petitioner's appeal to the Circuit Court of Appeals for the Sixth Circuit that court reversed the case and remanded it for a new trial on the ground that the trial court had erred in failing to give an instruction tendered by petitioner, but refused to dismiss the case and overruled certain other specifications of error made by petitioner. The opinion of the Circuit Court of Appeals appears at Page 604 of the record and is reported under the style of Thompson v. Camp, 163 F. (2) 396.

Camp, a switchman in the employ of petitioner, was injured on the night of April 26, 1945 while engaged in switching operations in certain yards at Memphis, Tennessee. He was taken to the hospital where his injuries were diagnosed as a concussion of the brain with laceration of the brain tissue resulting in some hemorrhage into the spinal column.

He remained in the hospital until May 9, 1945 at which time he returned to his home, but did not return to his employment. On June 2, 1945, after a visit to the doctor's office, he was told by the doctor that he was "O. K., he could go back to work" (R. 65).

His wife was with him at the time and her testimony is to the effect that Camp was still suffering from headaches and dizzy spells to some extent and that neither she nor Camp agreed with Dr. Hendrix' opinion, but decided to act on his opinion with the result that Camp contacted the Claim Agent of petitioner on the same day, gave a statement as to how the accident had happened and signed a release settling his claim against petitioner for the sum of $500.00 which was paid to him at that time.

He returned to work on June 4, 1945 and worked intermittently until June 17, 1945 at which time he fainted while engaged in his employment and located on an engine. He did not recover consciousness and died the next morning. Both the District Court and the Circuit Court of Appeals have concurred in the jury verdict to the effect that his death was the result of his injuries on April 26th.

The release which was signed on June 2, 1945 is as follows:

"Frank A. Thompson, Trustee.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
DR. GENERAL RELEASE

"WHEREAS, I, Ervin R. Camp, of 3028 Carnes Avenue, Memphis, Tennessee, was injured on the 26th day of April, 1945, at or near Memphis, Tennessee, on a line of railroad operated or used by Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor (hereinafter called 'Trustee'), while working as switchman near K. C. Junction I fell, while alighting from a moving cut of cars, under circumstances which I claim render

said Trustee liable in damages, although such liability is denied by said Trustee, and, the undersigned being desirous to compromise, adjust and settle the entire matter:

"NOW, THEREFORE, in consideration of the sum of:

"Five Hundred and no/100 DOLLARS ($500.00) to me this day paid by said Trustee, the receipt of which is hereby acknowledged, I do hereby compromise said claim and do release and forever discharge said Trustee, his successor or successors, agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages which I have or might have arising out of the accident above referred to, both to my person and property, as well as from all claims or demands of any kind whatsoever, and do hereby acknowledge full satisfaction of all such liability and causes of action.

"This release is executed by me solely for the consideration above expressed, without any other representation whatsoever, and without any agreement or obligation on the part of said Trustee, his successor or successors, for my future employment.

"I further represent and covenant that at the time of receiving said payment and signing and executing this release, I am of lawful age and legally competent to execute it, and that before signing and executing it I have fully informed myself of its contents and executed it with full knowledge thereof.

"I have read and understand this release.

"Given under my hand and seal this 2nd day of June, A. D. 1945.

(Signed) Ervin R. Camp.

WITNESS:
Mrs. Ervin R. Camp,
Address: 3028 Carnes Ave.,
Memphis, Tenn.
T. R. Kehoe,
Address: 1173 Tutwiler,
Memphis, Tenn.
H. W. Westbrooke."
R. 12, 13, 14.

Mrs. Camp, the respondent, testified as follows with respect to what occurred when she and Camp visited the doctor on June 2nd:

"Q At the time Mr. Camp signed the release did or not you and Mr. Camp believe he was able to go back to work?

A No, sir; we didn't. He just felt like he had to because we didn't have any money."
R. 68.

She also testified that Camp was anxious to get back to work as soon as the doctor thought he was able because he had responsibilities. She testified specifically as follows:

"Q And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be OK, or 'You are OK, go back to work', I believe you said on direct examination, that you did not agree, and Mr. Camp did not agree, that he was all right, and able to go back to work?

A I didn't. Still, I thought the doctor knew what he was talking about.

Q So that Dr. Hendrix said 'OK, go back to work,' and you and Mr. Camp did not agree with that, but he went on back to work anyhow?

A There was nothing else he could do but go back to work."
R. 93, 94.

She also testified that at that time Camp told Dr. Hendrix he was still having headaches and dizzy spells. R. 92-93.

The medical evidence was to the effect that after injuries such as Camp had received there was no absolute way to tell that he had completely recovered; that in most cases where the subjective and objective symptoms had quieted down the injuries were cured, but that in some cases there might still be a slight internal hemorrhage, and that if this continued, it would build up a pressure which would finally result in death if it were not promptly recognized and dealt with, and that this was what occurred in Camp's case.

Under this evidence it was petitioner's position that there was no mutual mistake of fact upon which to base a recission of the release since Camp himself, as indicated in Mrs. Camp's evidence, did not believe that he was well and able to go back to work and since even if he did, no mistake of present fact was involved, but merely a mistake as to the future development of his admittedly known injuries.

It was also petitioner's position that in any event the settlement could not be set aside on the ground of mutual mistake of fact because it had been made in the light of a dispute between the parties as to liability and because Camp had specifically contracted in the release against injuries which might thereafter develop as well as those apparent at the time the settlement was made.

Petitioner was overruled in all of these matters by the Circuit Court of Appeals.

During the trial plaintiff offered evidence of the amount for which an insurance company would sell an annuity without refund to a person forty years of age which would pay him $3,000.00 a year until his death. This evidence was admitted by the trial court over the objection of the petitioner.

The Circuit Court of Appeals held that this evidence was properly admitted if coupled with a proper charge (R. 613-614) and while subsequently holding (R. 615) that the proper charge had not been given and reversing and remanding for that reason, it nevertheless held the evidence in question admissible.

## STATEMENT AS TO BASIS OF JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended (28 USCA, Sec. 347). The judgment of the Circuit Court of Appeals was entered on August 11, 1947 (R. 603). Petitions for rehearing filed by both petitioner and respondent were overruled by the Circuit Court of Appeals on October 7, 1947 (R. 643).

## QUESTIONS PRESENTED

I.

A man receives certain known physical injuries and the doctor, believing that his injuries are cured, tells him that he is OK and can go back to work. Although he does not agree with the physician and still complains of symptoms, he goes back to work and also settles his claim for injuries under the Federal Employer's Liability Act. When it later develops that his injuries were not cured and he dies from those injuries, can his administratrix

then rescind the settlement on the ground of mutual mistake of fact in view of the fact that he admittedly did not believe the doctor's opinion that he was well at the time that he settled his claim?

II.

Where a man has received injuries the nature of which is known and it is believed by the parties that those injuries are cured and a settlement of his claim for damages under the Federal Employer's Liability Act is then made but it later develops that his injuries were not completely healed and he dies from those same injuries, can the settlement be avoided on the ground of mutual mistake of present fact, or has there been merely a mistake as to the duration of a known injury?

III.

Where a claim is made for personal injuries and a dispute exists as to liability and a settlement is made and a release signed which states not only that the liability is disputed but that the injured party releases the tort feasor "from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent," can the release subsequently be set aside on the ground of mutual mistake of fact when it develops that the admittedly known injuries which were then thought to have been healed were not in fact healed and subsequently such injuries caused his death?

IV.

In a suit for damages under the Federal Employer's Liability Act for the alleged wrongful death of the plaintiff's intestate, is evidence of the charge made by an in-

surance company for an annuity without refund admissible in evidence?

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I.

Important questions with respect to the validity of a release of a claim for damages under the Federal Employer's Liability Act are presented. Confusion has existed in the past as to whether a belief by the parties that the injured person is well and cured of known injuries is a belief as to present fact or as to the future development of known injuries. This confusion exists in the decisions of the various Circuit Courts of Appeal. The Circuit Court of Appeals in the instant case has held that under such circumstances there is a mutual mistake of present fact.

II.

An important question the decision of which will influence all settlements under the Federal Employer's Liability Act is presented by the fact that the Circuit Court of Appeals in this case has held that the plaintiff might rescind for mutual mistake of fact a release providing that the releasor is releasing all claims for all injuries including those that may hereafter develop as well as those now apparent, and has also held that the fact that there existed between the parties at the time the settlement was made a dispute as to liability would not prevent such rescission.

III.

An important question of the admissibility of evidence, applicable in all death cases under the Federal Employ-

er's Liability Act, and possibly in other cases, is presented in that the Circuit Court of Appeals has held that evidence of the amount for which a life insurance company would sell a contract of annuity without refund to a person of a given age is relevant and admissible on the question of damages in such actions.

## PRAYER

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals of the Sixth Judicial Circuit commanding that court to certify and send to this court for review and determination on a day certain to be named therein a full and complete transcript of the record and proceedings in the case entitled and numbered on its docket "Frank A. Thompson, Trustee for the St. Louis-San Francisco Railway Company, Debtor, Defendant-Appellant vs. Louise Camp, Administratrix of the Estate of Ervin (Erving) Camp, Deceased, Plaintiff-Appellee, No. 10362" to the end that said case may be reviewed and determined as provided in Section 240(a) of the Judicial Code as amended (28 USCA, Sec. 347), and that the judgment of the Circuit Court of Appeals for the Sixth Circuit reversing and remanding said cause for a new trial be reversed by this Honorable Court and that said cause be dismissed, or in the alternative, that so much of the opinion of the said Circuit Court of Appeals for the Sixth Circuit as holds that evidence of the amount for which a life insurance company would sell an annuity without refund to a person of a given age is admissible in an action for wrongful death under the Federal Employer's Liability Act be reversed; and that your peti-

tioner have such other and further relief in the premises as to this Honorable Court may seem right and proper.

EDWARD P. RUSSELL,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee
Attorney for Petitioner.

COOPER TURNER, JR.
CANADA, RUSSELL & TURNER,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee,
Of Counsel.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### OPINIONS OF THE LOWER COURTS

No formal opinion was delivered by the District Court. The order of the District Court overruling petitioner's motion to set aside the verdict and for judgment, or in the alternative for a new trial and entering judgment against petitioner in favor of respondent is found at Record Pages 592-593.

The opinion of the Circuit Court of Appeals is found at Page 604 of the record and is reported under the style of Thompson v. Camp, 163 F. (2) 396.

The judgment of the Circuit Court of Appeals is found at Page 603 of the record.

The judgment of the Court of Appeals overruling the petitions for rehearing filed by both parties is found at Page 643 of the record.

### JURISDICTION

A statement of the basis of jurisdiction in this cause is found at Page 8 of the foregoing petition for writ of certiorari.

### STATEMENT OF THE CASE

See Summary statement of Matters Involved at Page 2 of the foregoing petition for writ of certiorari.

## SPECIFICATION OF ERRORS

### I.

The Circuit Court of Appeals for the Sixth Circuit erred in remanding this cause for a new trial rather than dismissing the cause. This was error because:

1. When the parties settled Camp's claim for injuries under the Federal Employer's Liability Act they were not laboring under a mistake of present fact. This was true not only because Camp did not agree with the doctor when he told him that he was all right and could go back to work, but also because the doctor's opinion under the circumstances, that is, Camp's continued symptoms of headaches and dizzy spells, necessarily amounted merely to an opinion as to his future progress and as to the future development of his known injuries.

2. When Camp settled his claim and signed the release not only was there an existing dispute between the parties as to liability, but the release itself provided for the discharge of all claims for all injuries including those that might thereafter develop as well as those then apparent.

### II.

The Circuit Court of Appeals erred in holding that the evidence of the witness Pritchartt with respect to the price for which a life insurance company would sell a contract of annuity without refund to a person of given age was admissible under any circumstances. This was error because the price for which an insurance company would sell such a contract was based not only upon a preferred risk class to which Camp did not belong, but nec-

essarily included a substantial element of profit to the company and was wholly irrelevant on the question of damages.

## ARGUMENT

### I.

### CAN THE ADMINISTRATRIX OF A CLAIMANT UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT WHO RECEIVED CERTAIN KNOWN PHYSICAL INJURIES AND WHO SETTLED HIS CLAIM AGAINST HIS EMPLOYER AFTER HIS PHYSICIAN HAD ADVISED HIM THAT HE WAS ALL RIGHT AND COULD GO BACK TO WORK ALTHOUGH THE CLAIMANT HIMSELF KNEW THAT HIS SYMPTOMS STILL PERSISTED AND DID NOT AGREE WITH THE DOCTOR'S OPINION, THEREAFTER, WHEN THOSE SAME INJURIES CAUSE HIS DEATH, SET ASIDE THE SETTLEMENT ON THE GROUND OF MUTUAL MISTAKE OF FACT ON THE BASIS THAT AT THE TIME OF THE SETTLEMENT THE PARTIES, INCLUDING THE CLAIMANT BELIEVED HE WAS WELL?

There is, of course, no dispute but what releases for personal injuries under certain conditions may be set aside. It is well settled, however, that where the ground for setting aside the release is mutual mistake of fact, the mistake must be with reference to a past or present fact. Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8).

The question is then presented as to whether the parties in this case, when the settlement was made on

June 2, 1945, were acting under any mistake of present or past fact. There is no contention that there was any mistake of a past fact. The respondent's position has constantly been that the parties were acting under a mistake of present fact in that they believed Camp was well and able to go back to work.

It would seem elementary that in order to maintain this position the evidence would have to show that Camp believed that he was well and able to go back to work. It is therefore somewhat surprising to find that the evidence instead supports the exact contrary.

Mrs. Camp, the administratrix and widow, testified that on June 2nd when she and Camp visited Dr. Hendrix' office for the purpose of having Camp examined, that a part of his examination consisted of talking with Mr. Camp and inquiring as to how he felt and that Mr. Camp at that time told Dr. Hendrix that he was still having headaches and dizzy spells (R. 92-93). It was her position all along that Camp's symptoms had never ceased.

She also testified as follows:

> "Q At the time Mr. Camp signed the release, did or not you and Mr. Camp believe he was able to go back to work?
>
> A No, sir; we didn't. He just felt like he had to, because we didn't have any money."
>
> R. 68.

Again she testified:

> "Q And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be OK, or 'You are OK, go back to work,' I believe you said on direct examination, that you did not agree, and Mr. Camp did not agree, that he was all right, and able to go back to work?

A I didn't. Still, I thought the doctor knew what he was talking about.

Q So that Dr. Hendrix said 'OK, go back to work', and you and Mr. Camp did not agree with that, but he went on back to work anyhow?

A There was nothing else he could do but go back to work."

R. 93, 94.

The only inference which can be drawn from this testimony is that Camp, at the time he made the settlement on June 2, 1945, had been told by the doctor that he was all right and able to go back to work, but that he himself did not agree with the doctor, but in view of the doctor's opinion was willing to go on back to work.

It seems somewhat strange for the respondent then to take the position that Camp did believe that he was well and able to go back to work. That position, of course, was necessary in order to successfully set aside the release on the ground of mistake of fact, but that position clearly is not supported by the evidence when she herself testifies that Camp did not believe that he was all right and did not agree with the advice of the physician.

II.

WHERE A MAN HAS RECEIVED INJURIES THE NATURE OF WHICH IS KNOWN AND ALTHOUGH HIS SYMPTOMS STILL PERSIST, HE IS ADVISED BY THE PHYSICIAN THAT HE IS WELL AND CAN GO BACK TO WORK AND AS A RESULT OF THAT ADVICE HE SETTLES HIS CLAIM FOR DAMAGES UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT AND IT THEREAFTER DEVELOPS THAT HIS INJURIES WERE NOT WELL AND HE DIES FROM THOSE SAME INJURIES, CAN THE SETTLE-

MENT BE AVOIDED UPON THE GROUND OF MUTUAL MISTAKE OF PRESENT FACT OR HAS THERE BEEN MERELY A MISTAKE AS TO THE DURATION OF A KNOWN INJURY?

As pointed out before, the testimony of the respondent, Mrs. Camp, is to the effect that when Camp appeared in Dr. Hendrix' office for his last examination on June 2, 1945, he was still having headaches and dizzy spells and so advised Dr. Hendrix (R. 92-93). At that time Dr. Hendrix, after concluding his examination, advised Camp that he was all right and could go back to work.

It is the petitioner's position that under these circumstances, even conceding that the parties believed the opinion of Dr. Hendrix (which Mrs. Camp said they did not) still they were laboring under no mistake of present fact, but merely under a mistake in the opinion of the physician as to how long Camp's injuries and resulting symptoms would remain and what effect upon his condition going back to work would have.

It seems obvious that when a patient's symptoms still continue particularly to the extent where, as in Camp's case, he still had headaches and dizzy spells from a blow on the head and a doctor advises him that he is "OK and can go back to work" necessarily he is being given the opinion of the physician that he will recover and that going back to work will not hurt him. Conceding for the purpose of this argument that an outright opinion that a man is well where no symptoms persist might conceivably be considered as the expression of a present fact, nevertheless it would seem apparent that where the symptoms persist and a man does not feel well that an opinion to the effect that he is all right and can go back

to work could never be anything but an opinion of the physician that going back to work will not hurt him and that he will recover completely in due course.

That this was the effect of the opinion of Dr. Hendrix and that it was so understood by Camp is further evidenced by the fact that neither Camp nor Mrs. Camp agreed with the physician when he gave this opinion, but Camp decided that he would go ahead and go back to work and would also settle his claim. It is inconceivable that Camp, knowing that his headaches persisted and that his dizzy spells still continued and still feeling badly to such an extent that he disagreed with the physician's opinion that he was all right and could go back to work, could have drawn any conclusion from that opinion except that it would not hurt him to go back to work and that he would ultimately recover.

In the case of Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913, the court said:

> "A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing. Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 361, 83 Fed. 437, 440; Insurance Co. vs. Nelson, 103 U.S. 544, 548, 549, 26 L. Ed. 436; Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Howland v. Blake, 97 U. S. 624, 626, 24 L. Ed. 1027; Insurance Co. v. Henderson, 16 C. C. A. 390, 392, 69 Fed. 762, 765. Again, it is not every mistake that will lay the foundation for the recission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an

uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury,, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties."

This case has been a leading case upon this question for many years. The Circuit Court of Appeals says that the rule is different in the Sixth Circuit citing Lumley v. Wabash R. Co., 76 F. 66 as authority for this position, and in the opinion the Circuit Court of Appeals quotes from the Lumley case as follows:

"If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received cer-

tain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release woud not have been signed."

It is apparent that the case is not authority for the position of the Circuit Court of Appeals for the reason that, as stated in the Circuit Court of Appeals' opinion (R. 608), the mistake there was that the patient had a fractured and dislocated shoulder which the physician failed to discover. It was thought that the pain in the shoulder originated from another injury.

It is clear from this statement and from the opinion of the court in the Lumley case that the release was set aside because of this mistake on the part of the parties as to the nature of the injury.

In the present case there was no question about what the injury was. The only mistake was as to whether the internal hemorrhage from that injury had ceased.

The Circuit Court of Appeals in its opinion (R. 610) makes it clear that the physician's opinion was one as to the future progress of the matter and that Camp so understood. The court says:

"Camp relied upon the doctor's opinion, at least with respect to the fact that his recovery was practically compete, that he could safely return to work

> and did not require any further medical attention, and that there would not be any subsequent, unexpected developments."

The court goes on to say that in acting under this belief Camp was acting under a mistake of fact. It seems clear to us that he was not acting under a mistake of fact, but was acting under a mistaken belief that the doctor's opinion as to the future development of his condition was sound. It is difficult to formulate language which would more clearly constitute an opinion as to the future condition of things than the language used by the Circuit Court of Appeals with respect to Camp's belief on this occasion, and we submit that the court was in error in holding that the parties acted under any mistake of fact and in refusing to uphold the validity of the release under these circumstances.

## III.

WHERE A CLAIM IS MADE FOR PERSONAL INJURIES AND A DISPUTE EXISTS AS TO LIABILITY AND A SETTLEMENT IS MADE AND A RELEASE SIGNED WHICH STATES NOT ONLY THAT THE LIABILITY IS DISPUTED BUT THAT THE INJURED PARTY RELEASES THE TORT FEASOR "FROM ANY AND ALL LIABILITY FOR ALL CLAIMS FOR ALL INJURIES, INCLUDING THOSE THAT MAY HEREAFTER DEVELOP AS WELL AS THOSE NOW APPARENT," CAN THE RELEASE SUBSEQUENTLY BE SET ASIDE ON THE GROUND OF MUTUAL MISTAKE OF FACT WHEN IT DEVELOPS THAT THE ADMITTEDLY KNOWN INJURIES WHICH WERE THEN THOUGHT TO HAVE BEEN HEALED WERE NOT IN FACT AND SUBSEQUENTLY SUCH INJURIES CAUSED HIS DEATH?

The release in question read as follows:

"WHEREAS, I, Ervin R. Camp, of 3028 Carnes Avenue, Memphis, Tennessee, was injured on the 26th day of April, 1945, at or near Memphis, Tennessee, on a line of railroad operated or used by Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor (hereinafter called 'Trustee'), while working as switchman near K. C. Junction I fell, while alighting from a moving cut of cars, under circumstances which I claim render said Trustee liable in damages, although such liability is denied by said Trustee, and, the undersigned being desirous to compromise, adjust and settle the entire matter:

"NOW, THEREFORE, in consideration of the sum of:

"Five Hundred and no/100 DOLLARS ($500.00) to me this day paid by said Trustee, the receipt of which is hereby acknowledged, I do hereby compromise said claim and do release and discharge said Trustee, his successor or successors, agents and employees, from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages which I have or might have arising out of the accident above referred to, both to my person and property, as well as from all claims or demands of any kind whatsoever and do hereby acknowledge full satisfaction of all such liability and causes of action.

"This release is executed by me solely for the consideration above expressed, without any other representation whatsoever, and without any agreement or obligation on the part of said Trustee, his successor or successors, for my future employment.

"I further represent and covenant that at the time of receiving said payment and signing and executing this release, I am of lawful age and legally competent to execute it, and that before signing and executing it I have fully informed myself of its contents and executed it with full knowledge thereof.

"I have read and understand this release.

"Given under my hand and seal this 2nd day of June, A. D. 1945.

(Signed) Ervin R. Camp"
R. 12, 13, 14.

It will be observed that not only does the release contain a provision to the effect that Camp is releasing all claims for all injuries including those "that may hereafter develop as well as those now apparent" but said release also contains a provision to the effect that there is a dispute as to liability between the parties.

In addition, the testimony of both Mrs. Camp and Mr. Westbrooke was to the effect that at the time the settlement was made there did exist an actual dispute between the parties as to liability (R. 66, 431, 438). It is our position that under these circumstances it is not sound to say that the release can be set aside and held void because of an alleged mutual mistake of fact as to whether or not Camp was well at the time he signed the release.

The Circuit Court of Appeals in its opinion did not discuss this point although the point was made, briefed and argued. It seems clear under the authorities that the release should be upheld under these circumstances Richardson v. C. M. & St. P. R. R. Co., 157 Minn. 474, 196 N. W. 643; Cogswell v. Boston & Maine R. R. Co., 78 N. H. 379, 101 Atl. 145; Sitchon v. American Export Lines, 113

F. (2) 830 (C. C. A. 2); Serr v. Biwabik Concrete Aggregate Co., 202 Minn. 165, 278 N. W. 355; Berry v. Struble, 20 Cal. App. (2) 299, 66 P. (2) 746; Moses v. Carver, 164 Misc. 204, 298 N. Y. Supp. 378, affirmed 254 App. Div. 402, 5 N. Y. Supp. (2) 783; McIsaac v. McMurry, 77 N. H. 466, 93 Atl. 115; Quebec v. Gulf C. & S. F. R. Co., 98 Tex. 6, 81 S. W. 20; 45 Am. Jur., Release, Secs. 19, 20; 53 C. J. Release, Sec. 30.

Giving to the plaintiff the benefit of all evidence in the plaintiff's favor and the benefit of all disputes in the testimony, the strongest that can be said is that when Camp executed the release he knew that he had had a concussion of the brain with a laceration of the brain tissue and a resulting hemorrhage into his spinal column. Both parties under the plaintiff's view of the evidence thought that this condition had been corrected and that Camp was all right at the time the release was signed, but it subsequently developed that he had not been completely cured since there was a slight hemorrhage remaining which in time built up a sufficient pressure to cause his death.

Mrs. Camp as administratrix, which in effect is the same as Camp himself, now says that if that fact had been known at the time the release was signed, it would not have been signed.

Conceivably that might be true. The fact remains, however, that the release itself contains a clause specifically stating that the release is to cover all injuries including those which may develop thereafter as well as those apparent at the time the release was signed. Obviously, this clause was included in the release for the

specific purpose of providing against the contingency that there might be some unknown injury or some unknown condition existing at the time the settlement was made.

To get at the proposition a little more clearly let us suppose that the release had read in part as follows:

> "We believe that the injury sustained by Camp is cured now, but should it develop in the future that such injury is not cured and should the undersigned Camp subsequently die from the effects of said injury, the undersigned Camp still releases all claims therefor."

Could it be successfully argued that this release could be set aside on the basis of mutual mistake of fact when it subsequently developed that the known injury was not cured as supposed? Certainly it would not seem so because it is clear that one of the very subjects of the contract was the release of the company from any liability because of such unknown conditions. In other words, the releasor under such a release would clearly be contracting to take the risk that he might no be well.

Yet the release in the present case, while not couched in the same words, is identical in tenor and substance. The clause in question could have no effect if not that which we have ascribed to it. Its only purpose could be that of eliminating the possibility that the company would have to pay again because of the development of unknown conditions presently existing.

It seems to us that if the release in the present case is not effective to provide against such a situation, then it is not humanly possible to draft a release which would have that effect.

We concede, of course, that a release, under proper circumstances, may be set aside because of a mutual mistake of a present or past fact. Likewise we concede that such mistake may extend to the nature or extent of the injuries. On the other hand, surely it cannot be disputed that the parties may validly contract so as to cast upon the employee the risk that the parties are not fully acquainted with the actual nature and extent of the employee's injuries. The court will find from an examination of the cases that almost without exception the cases where releases have been set aside under such circumstances involved releases referring to specific injuries and containing general language as to the release and not containing specific clauses releasing claims for future developments or for unknown injuries. The contention may logically be made in those cases that the parties were not contracting against the possibility of unknown injuries or against the possibility of a mistaken belief as to the nature or extent of known injuries.

Where, however, the release contains a specific clause referring to such unknown injuries or injuries to develop in the future, there would seem to be no logical basis for saying that the employee may set aside the release because he later learns that such unknown injuries existed or that his known injuries were worse than he anticipated.

The same result must follow where the release is made pursuant to a dispute as to liability. That this was the case here is not disputed because as pointed out, not only does the release contain such a provision, but the parties testified that that dispute existed. The court lays emphasis on the fact that the amount paid in settlement of

the claim was not greatly in excess of the time which Camp had lost. We recognize that some cases have referred to this as a material element, yet the fact remains that if there was no liability for the injury, then the defendant would not have owed Camp even the amount of his lost time. It may be argued that if Camp had known that he was not well and that his condition might become aggravated in the future, he would not have settled for $500.00. On the other hand, the defendant was denying any liability and it may well have been that even if Camp had known that his condition was not entirely well, he would still have settled for $500.00 rather than take the chance that he would get nothing whatever. There is no way to determine that fact because Camp cannot testify and regardless of what Mrs. Camp would like to say, she, of course, cannot testify as to Camp's impressions and his thoughts. The cases herein cited sustain the proposition which we have argued here, and we believe that under the facts they are peculiarly applicable to this case.

## IV.

IN A SUIT FOR DAMAGES UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT FOR THE ALLEGED WRONGFUL DEATH OF THE PLAINTIFF'S INTESTATE, IS EVIDENCE OF THE CHARGE MADE BY AN INSURANCE COMPANY FOR AN ANNUITY WITHOUT REFUND ADMISSIBLE IN EVIDENCE?

Over objection of the petitioner respondent introduced evidence of the witness Pritchartt as follows:

"Q Does your company, and others, sell annuities?

A Yes, sir.

Q What would it cost—

MR. TURNER: I object to any question about what an annuity would cost, of any kind or character. It is not proper under any issue in the lawsuit as to what you might have to pay to get an annuity.

THE COURT: It is not controlling, but it is for the jury to consider that type of evidence, I think.

MR. TURNER: I submit it is not evidence, the fact as to what it would cost to buy an annuity from some insurance company.

MR. ARMSTRONG: I state that it is.

MR. TURNER: The evidence that is admissible on the issue that is involved is what is the reasonable cash value of the contributions that are reasonably to be expected. Now, that has not anything in the world to do with what an annuity would cost. It is simply what is the present cash value of what might reasonably be expected to be his contributions.

MR. ARMSTRONG: The United States Supreme Court has passed on it; so has the Sixth Circuit. We have had it up here in other cases.

THE COURT: I think it is competent.

MR. TURNER: Note an exception.

Q When I asked about an annuity, I mean where there is no money left at the end of the time, so it is a completed period. What would it cost to buy an annuity, a man of thirty-three years of age, of three thousand dollars a year?

A The annuities sold at those ages, Mr. Armstrong, are so rare that the figure below forty is not quoted in the book.

Q What have you to say as to that?

A Man, or woman?

MR. ARMSTRONG: Man.

THE WITNESS: You mean what would it cost to buy an annuity without refund, for what amount?

MR. ARMSTRONG: No; for an annuity to produce three thousand dollars a year, would be a completely absorbed annuity.

A If this calculation is correct, $74,520.00.

Q Of course, the younger a man is, the longer his life expectancy?

A Well, yes, according to the experience tables.

Q So that the younger he is, the more the annuity would cost?

A That is true.

Q Now, when the expectancy—can you get the expectancy there—when a man has an expectancy we will say, of thirty-two years—you can look at it there—how old would he be when he had an expectancy of thirty-two years?

A At age thirty-four, there is an expectancy of 32.5.

Q At forty, what is the expectancy?

A 28.2.

Q When the expectancy was as much as 32 years, what would be the cost of an annuity? It would be more than $72,000.00, wouldn't it?

A Wait a minute. I don't quite follow you.

Q All right. When a man is forty years of age, he has an expectancy of how many years, Twenty-eight?

A When a man is forty years old, he has an expectancy of 28.2.

Q And an annuity of three thousand dollars a year would cost how much money, at that time?

A How much per hundred?

MR. ARMSTRONG: Yes.

A $2,484.00.

Q And the total amount would be how much?

A $74,520.00.

Q Now, the main point is, the longer the expectancy, the greater the cost of an annuity, is that it?

A Yes, except those are reckoned by the cost of annuity at the time of application. If they were younger than forty, it would be presumed they would have a longer expectation of life than a man who has already attained forty.

MR. ARMSTRONG: All right, I see. The higher the cost of the annuity. That is all.—"

R. 285-288.

"Q Could a man thirty-two years old buy an annuity for life for any less than seventy thousand dollars?

A No, it would cost him more."

R. 292.

It is petitioner's position that not only is this evidence inadmissible because as shown by other testimony of the witness Pritchartt (R. 290, 291), the cost of such annuity contracts is based upon an entirely different classification from the ordinary mortality or annuity tables and based upon a classification which essentially is a preferred risk classification and to which a man in Camp's position would not belong, but also because the amount for which an insurance company would sell such a contract involves many immaterial elements including particularly a large element of profit to the company and would be wholly irrelevant on the issue of damages.

There are standard annuity tables based upon standard mortality tables which are admissible in evidence on the issue of the present cash value of contributions or income to be received at stated intervals in the future for a given length of time. Concededly those tables would be admissible in evidence, but a wholly different result is reached under those tables and under the tables setting forth the prices for which a life insurance company would sell such a contract.

There is a dearth of authority upon this question apparently occasioned by the fact that parties have never considered such evidence relevant. The Circuit Court of Appeals in holding that this evidence was admissible

under a proper charge (R. 614) cited a number of cases only one of which in anyway involved this question. This is the case of Baltimore & O. R. Co. v. Henthorne, 73 F. 634. The Court of Appeals for the Sixth Circuit in that case, decided in 1896, did hold that the price of such an annuity contract was a proper measure of damages. It did so without any extended discussion and without the citation of any authority.

To the contrary is the case of Goodhart v. Penn. R. Co., 35 Atl. 191, 177 Pa. 1 where the question was squarely presented and where the court said, in discussing the effect of the jury verdict in favor of the plaintiff that "it assumes in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market and purchase an annuity now, equal to his estimated earnings. The first, second and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums."

35 Atl., p. 193.

So here in a case under the Federal Employer's Liability Act the plaintiff is not entitled to a sum of money which would enable her to go out into the market and enter into a contract with some life insurance company or with any other person under which that company would agree to pay her a stated sum for the rest of her expectancy or for the rest of her deceased husband's expectancy had he lived, whichever might be the shorter.

At the most she would be entitled to the present cash value of the contributions which she might reasonably have expected had her husband lived. But it is clear that the present cash value of those contributions would not be sufficient to purchase her an annuity contract under which a life insurance company would pay her those reasonably to be expected contributions. Added to that figure would necessarily be a substantial sum necessary to assist the company in the payment of its overhead and expenses and to allow it a profit.

It seems clear that under these circumstances evidence of the price for which an insurance company would sell such a contract has no bearing upon the issues in a suit of this character and can serve only to inflate the ideas of a jury as to the amount of money which the plaintiff should have in lieu of the reasonably to be expected contributions.

We submit therefore that the Circuit Court of Appeals was in error in holding that this evidence was admissible under a proper charge or otherwise, and should have held that the evidence was not admissible and that it was prejudicial and should have reversed this case on that ground, and this court should now do so.

## CONCLUSION.

It is submitted in conclusion that the questions presented in the petition for writ of certiorari are substantial questions having a constant application in suits under the Federal Employer's Liability Act and that these questions should be passed upon and determined by this court and that accordingly the petition should be granted and the erroneous action of the Circuit Court of Ap-

peals for the Sixth Circuit corrected in the respects pointed out.

Respectfully submitted,

EDWARD P. RUSSELL,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee
Attorney for Petitioner.

COOPER TURNER, JR.
CANADA, RUSSELL & TURNER,
Twenty-Ninth Floor Sterick Building,
Memphis, Tennessee,
Of Counsel.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 517

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Petitioner,

vs.

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
Respondent.

## BRIEF

**Of Respondent in Opposition to Petition for Certiorari.**

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Respondent, Louise Camp, Administratrix of the Estate of Ervin Camp, Deceased.

Of Counsel:
W. E. HENDRIX,
R. G. DRAPER.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. .....

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Petitioner,

vs.

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
Respondent.

## BRIEF

**Of Respondent in Opposition to Petition for Certiorari.**

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for certiorari raises, in substance, but two questions, although petitioner subdivides the alleged issues into four questions.

The questions:

1. Was the release executed by Ervin Camp properly rescinded on the ground of mutual mistake of fact on the part of Camp and his employer?

2. Was evidence of the charge made by an insurance company for an annuity without refund admissible in evidence?

The District Court and the Circuit Court of Appeals properly answered both these questions in the affirmative. An analysis of the petition discloses no basis for upsetting the findings and rulings of the two lower courts, and the petition for certiorari should be denied.

## OPINIONS OF THE LOWER COURTS.

**Thompson v. Camp**, 163 Fed. 2d 396 (C. C. A. 6, August 11, 1947).

The statement of petitioner, headed as above (Petition for Certiorari and Brief, p. 13), is correct.

## JURISDICTION.

The statement of petitioner as to the basis of jurisdiction (Petition for Certiorari and Brief, p. 8) is not challenged.

## STATEMENT OF THE CASE.

Review by this Court of the facts is limited by the concurrent findings of the District Court and the Circuit Court of Appeals on the issue of mutual mistake vitiating the release. Much of petitioner's summary statement of matters involved (Petition for Certiorari and Brief, p. 2) is therefore irrelevant. However, in order that the statement may be accurate and complete there is added the following:

Dr. M. B. Hendrix was the only doctor who had treated Ervin Camp or examined him prior to the execution of the release (R. p. 465).

Mrs. Camp testified that she asked to have Dr. R. E. Semmes, one of the leading brain specialists of the South, called into consultation, but that Dr. Hendrix "said it was not any use to do that, he would call him in, but if he did he would have to move him from the hospital, and the Railroad would not be responsible for anything" (R. p. 63). As a consequence Dr. Hendrix continued in sole charge of the case (R. pp. 86-92).

The Dr. R. E. Semmes, whose services were requested by Mrs. Camp, was the same Dr. R. E. Semmes who testified for the plaintiff that Ervin Camp's death was caused by the original injury (R. pp. 104, 108, 109, 119), that Camp was not able to go back to work when he was released by Dr. Hendrix (R. pp. 109, 110, 118, 119, 121), and that his condition could have been relieved by an operation which would not have been dangerous (R. pp. 105, 106).

While Dr. Hendrix was employed by the Frisco Employees' Hospital Association, the president of the Association was the first operating officer and director of the Frisco System; the treasurer of the Frisco was also treas-

urer of the Association, and the general attorney of the Frisco was the general solicitor for the Association (R. pp. 476-477). Dr. Hendrix was also the local or divisional surgeon for the Frisco and examined on behalf of it all of the employees who applied for positions (R. pp. 459, 503, 504), and persons who had claims against the company were regularly referred to him for examination (R. pp. 457, 458). He was recognized as an employee of the Frisco since an annual pass on the lines was issued to him (R. p. 504).

Dr. Hendrix recognized his duty as an employee of the Frisco in that he followed the routine when he released an employee by notifying him that he must go to the Claim Agent and sign a release before he could go back to work (R. pp. 494, 495, 496, 498). Thus, even if there was any real relationship of patient and doctor between Dr. Hendrix and Ervin Camp it is obvious that Dr. Hendrix' loyalty was divided, and it could be easily found from the facts that he considered his primary loyalty to the Frisco. Clearly, under these circumstances Ervin Camp did not have the judgment or advice of an independent physician devoted solely to his interests. Although the full effect cannot be had from the printed record, even when read Dr. Hendrix' testimony discloses a brusqueness and impatience not indicative of any great interest in Camp's welfare.

It is a fair and indeed a necessary inference that Ervin Camp had a fixed determination not to execute any release so long as he had any reason to believe there would be future consequences from his injury. In his mind that was to be determined by the date he was released by the doctor to go back to work. Although approached several times by the Claim Agent prior to being released by Dr. Hendrix, he consistently refused even to make or sign any

statement as to the occurrence of the accident (R. pp. 80, 89, 425).

The effect of this was an agreement between Camp and the Claim Agent that nothing would be done about the settlement of Camp's claim until Camp had been assured by the doctor that he was well and able to return to work without danger of further interruption, and that then they would confer about a settlement. This being the situation, Camp received this assurance from the doctor on June 2, when the doctor "told him he was O. K., he could go back to work" (R. p. 65). Dr. Hendrix testified that under such circumstances it was not necessary to telephone the Claim Agent, but that it was his practice, and the inference from his testimony is that that practice was followed in this case. In any event, he told Camp that he was able to go back to work but could not do so until he saw the Claim Agent and signed a release (R. pp. 494-495). Ervin Camp having previously told the Claim Agent that he would not give a statement or execute a release until he had been assured by the doctor that he was well and able to go back to work, necessarily the effect of his stating to the Claim Agent that he was ready to see him, coupled with the routine ordinarily followed, put the Claim Agent on notice that Camp had been assured by the doctor that he was able to go back to work and there would be no further consequences of his injury. Mrs. Camp testified that when they returned from the doctor's office they found that the Claim Agent had left a call stating he wanted to see them (R. p. 65). Moreover, Ervin Camp expressly told the Claim Agent that the reason why he was ready to see him and settle his claim was that he had been assured by the doctor that he had recovered sufficiently to go back to work (R. pp. 427, 449, 450, 451, 452).

There can be no doubt but that Ervin Camp relied upon the doctor's assurance that he was O. K. and able to go

back to work, in executing the release. The fact that he had declined to take any steps toward this end prior to receiving this assurance by the doctor in itself is sufficient so to show.

It is to be borne in mind that the question is whether Ervin Camp relied upon the doctor's assurance and not what Mrs. Camp thought. The facts are that Camp accepted the assurance of the doctor and was guided by it, rather than by what he thought the over-anxiety of a loving wife. Mrs. Camp testified:

> "Q. Was there anything said about whether Mr. Camp could go back to work unless he signed a release?
>
> A. He told him he could not go back to work until he signed a release.
>
> Q. Now, previous to that time, the same afternoon, Dr. Hendrix had told him he was O. K., he was all right?
>
> A. Yes, sir.
>
> Q. He could go back to work?
>
> A. Yes, sir.
>
> Q. You really believed that?
>
> A. Yes, sir, we did.
>
> Q. That is why you were willing to talk to Mr. Westbrook?
>
> A. Yes, sir" (R. p. 67).

And, again, she said:

> "Q. And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be O. K. or 'You are O. K., go back to work,' I believe you said, on direct examination, that you did not agree, and Mr. Camp did not agree, and that he was all right and able to go back to work?
>
> A. I didn't. Still, I thought the doctor knew what he was talking about" (R. pp. 93-94).

She further stated:

"Q. Now, you say that Dr. Hendrix told him he was O. K., to go back to work, but you didn't think he was?

A. No, sir.

Q. But Mr. Camp did what Dr. Hendrix said, and not what you said, is that right?

A. That is right" (R. p. 95).

It is obvious from this testimony that while Mrs. Camp was fearful of future developments, Mr. Camp was reassured and acted upon the advice of the doctor. The situation had been the same when Dr. Hendrix had told Mr. Camp he could return home. As to this, Mrs. Camp testified:

"A. It had to some extent, but it had never completely cured up.

Q. And you didn't think, at the time he went home, he was able to go home?

A. No, sir. I asked the doctor not to release him.

Q. Did he want to go home?

A. I suppose so. He relied on what the doctor told him.

Q. I know, but, I say, did he want to go home, himself?

A. Certainly, if Dr. Hendrix thought he was able, well enough to go home" (R. pp. 86-87).

So on this occasion also Ervin Camp accepted the expert advice of the doctor instead of being influenced by the solicitude of his wife.

In testifying Dr. Hendrix left no doubt but that he assured Camp that he was able to go back to work (R. p. 499). Moreover, he stated that, if he could have in any sense foreseen what actually happened, he would not have advised Camp to go back to work (R. p. 509). The doctor admitted that both Mr. and Mrs. Camp were guided by his advice, saying:

"Q. I simply want to ask you whether Mr. and Mrs. Camp did what you told them to, relied on what you said; did they, or not?

A. They were very cooperative.

Q. Did what you told them to and relied on what you said, so far as you know, didn't they?

A. Yes, and I was very sincere and cooperative with them, tried to do everything I possibly could for him and every other Frisco employee I have ever treated" (R. p. 512).

There is no doubt left in the record but that the Claim Agent, Westbrook, also mistakenly believed and acted on the mistaken belief that Camp was well and able to go back to work and there would be no future results of his injury. Any other explanation of the settlement would indicate fraud on the part of Westbrook, and this is expressly negatived by the verdict of the advisory jury and the finding of the Judge of the District Court.

The situation of the parties clearly indicate that Westbrook acted on that belief. Ervin Camp had declined to settle until he was assured he was well and able to go back to work, and Westbrook had agreed to wait until this time. Therefore, the mere negotiating of the settlement indicated a belief on the part of both of them that Camp was well and able to return to work. Westbrook himself expressly testified that Camp had told him he was ready to talk settlement because he had been released by the doctor, told he was O. K. and able to go back to work, and that he, Westbrook, believed and acted on this (R. pp. 449-452). There was no discussion of the possibility of future consequences from the injury and no suggestion that Ervin Camp was agreeing to take a chance on future developments. The settlement was based on the fact that he had been released by the doctor, was O. K. and able to work.

Westbrook was a licensed attorney and especially skilled in employers' liability cases (R. pp. 441-442). It is true that he stated something to the Camps about lack of liability (R. pp. 66, 70). Camp had consulted no attorney and was represented by none. It is also true that the amount paid in full for the release (Five Hundred Dollars) was, according to Mrs. Camp, substantially what Ervin Camp would have earned with overtime (R. p. 68). Westbrook calculated the lost time at $324.83 and testified that this was one of the controlling elements of the settlements (R. p. 453). A fair inference from Westbrook's testimony is that he did not expect Camp to lose any further time and was making a settlement entirely on that basis.

It is true that Mrs. Camp stated that her husband was still having headaches at this time, but there is nothing in the record to indicate that either she or her husband realized that this was any prolongation of a serious condition or amounted to anything more than discomfort (R. pp. 86, 87, 93, 94). They were entitled to conclude this because they revealed these facts to Dr. Hendrix, and he stated that, notwithstanding them, Camp was able to return to work (R. pp. 75, 93).

The District Judge approved the verdict of the advisory jury finding mutual mistake of fact, and found as a fact that the release was made and given as the result of mutual mistake of fact (R. pp. 590, 592). The Circuit Court of Appeals, in its opinion, made concurrent findings to the same effect (R. pp. 605 et seq., passim, especially p. 611).

## ARGUMENT.

### THE RELEASE EXECUTED BY ERVIN CAMP WAS PROPERLY RESCINDED ON THE GROUND OF MUTUAL MISTAKE OF FACT ON THE PART OF CAMP AND HIS EMPLOYER.

*Applicable Rule of Law.*

The validity of a release executed by a railroad employee covered by the Federal Employers' Liability Act is governed by Federal law. **Wade Garrett v. Moore-McCormack Co., Inc.**, 317 U. S. 239, 87 L. Ed. 239; **Ricketts v. Pennsylvania R. Co.**, 153 Fed. (2d) 757 (C. C. A. 2).

In this case the issue of the validity of the release was tried and determined on the theory that the burden was on the respondent to produce "clear, unequivocal and convincing" proof that the release was made and given through mutual mistake of fact (R. pp. 542, 575).

That a different rule might apply and that the responsibility should rest upon petitioner to sustain the release, rather than upon respondent to overcome it, is strongly suggested by, and might flow from, **Wade Garrett v. Moore-McCormack Co., Inc.**, supra. Especially pertinent in extending the "admiralty rule" to non-maritime torts redressed by Federal law is the suggestive comment of this Court in footnote 17 of the opinion in the **Garrett case** (317 U. S. at p. 248, 87 L. Ed. at p. 245). The *ratio decidendi* of **Duncan v. Thompson**, 315 U. S. 1, 86 L. Ed. 575, might well lead to a conclusion that a railroad employee asserting rights under the Federal Employers' Liability Act should stand no lower on the ladder of judicial protection than an injured seaman seeking recovery under the Jones Act or similar acts.

But even on the trial theory in this case that the burden was on respondent to overcome the release by exceptional

evidence, that burden was successfully carried in the instant case.

*Scope of Review.*

The jury, acting in an advisory capacity, found that the release was executed as a result of mutual mistake (R. p. 573). The Court, acting independently, not only approved this finding but expressly found "that the release referred to in the proof was made and given as the result of mutual mistake of fact" on the part of Ervin Camp and the defendant (R. p. 592). The Circuit Court of Appeals made concurrent findings in accord with those of the District Judge, as well as ruling that under Rule 52 (a) of the Federal Rules of Civil Procedure, the finding of the District Judge was not "clearly erroneous" (R. pp. 610, 611).

Under the "well-established rule" of this Court, the concurrent findings of the courts below on these matters will be accepted by this Court "unless clear error is shown." **Just v. Chambers**, 312 U. S. 383, 385, 85 L. Ed. 903, 905; **Page v. Arkansas Natural Gas Corp.**, 286 U. S. 269, 271, 76 L. Ed. 1096, 1098; **Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks**, 281 U. S. 548, 558, 74 L. Ed. 1034, 1040.

The concurrent findings of the courts below effectively dispose of each and every element entering into the nonvalidity of the release: representation of fact, mistake, reliance. Not only is there no "clear error" in such findings, but ample, overwhelming evidence to support the correctness of the conclusions reached by both lower courts that the release was executed because Ervin Camp and petitioner's agent mistakenly believed that Camp was OK and able to go back to work. In this connection it is to be borne in mind that Dr. Hendrix was actually acting in a

dual capacity. Even if he be considered Ervin Camp's physician because he was employed by the Association (a question we shall hereinafter discuss) he was also representing the interest of the petitioner, not only generally but, in this particular case, by cooperating with the Claim Department. Therefore, as representative of both parties, if he was mistaken (as in fact he was) as to Camp's condition, this itself amounted to mutuality of mistake.

The record, however, goes much further. It clearly shows that Ervin Camp consented to execute the release only because of Dr. Hendrix's statement that he was OK and able to go back to work; he repeatedly declined even to discuss the matter until he received that assurance; when he received it he immediately acted upon it; the amount of the settlement related only to the time lost up to the date the release was executed. There is every indicium that Camp refused to deal in possibilities in regard to the extent of his injuries and only consented to execute a release when he was definitely informed that no further consequences were to be anticipated.

**DR. HENDRIX' STATEMENT THAT OF A PRESENT EXISTING FACT AND NOT A MERE MATTER OF OPINION.**

It is not strongly insisted by the petitioner that the parties did not mistakenly act upon the statement of Dr. Hendrix. The real insistence is one of law—that this statement of Dr. Hendrix was not the statement of a present existing fact but a mere expression of opinion and therefore cannot be considered a mutual mistake which justifies the avoidance of the release. Before we discuss the law we emphasize that under the facts it clearly could be found that this was a statement of a present fact. Dr. Hendrix told Ervin Camp "he was OK, he could go back to work." No expression in the English language is more expressive or better comprehended, both by English-speaking peoples and others throughout the world, than the ex-

pression "OK". It is the one American expression which all peoples understand. H. L. Mencken's **American Language**, pp. 205-208, and **Supplement One** to same, pp. 269-279. "Of all Americanisms 'OK' has been the greatest success. It has been borrowed by virtually all civilized tongues and also by many lower down the scale." Ibid, p. 276. "OK" is not only expressive but as applied to an individual its meaning is unmistakable. See **Words and Phrases**, Permanent Edition, Vol. 29, p. 399, et seq. Under the circumstances it meant that Camp was well and was able to go back to work. It did not necessarily indicate that he would not have future discomfort; it did unequivocally mean that he was cured and would be able not only to go to work but to continue his work. It was therefore no mere expression of opinion but a statement of fact by the doctor. Under the authorities such a statement clearly is the basis for avoidance of a release on the ground of mutual mistake.

**CASES HOLDING THAT SUCH A STATEMENT AS THAT MADE BY DR. HENDRIX IS PROPER BASIS FOR AVOIDANCE OF RELEASE ON THE GROUND OF MUTUAL MISTAKE.**

Whatever doubt there may formerly have been as to the rule, under present-day authorities there can be no question but what a release induced by such erroneous statement as that made by Dr. Hendrix is voidable on the ground of mutual mistake. One of the leading cases is **Lumley v. Wabash R. Co.**, 76 Fed. 66 (C. C. A. 6). In that case one who was traveling as an attendant to a carload of horses was injured as a result of the negligence of the railroad. He was attended by the company surgeon who found two injuries, contusion of the forehead and a fracture of the right arm. There was complaint of pain in the shoulder but the surgeon assured the injured man that this "was due to the broken arm and was wholly 'sympathetic.'" The surgeon told the claimant and the claim agent "that the fracture would be entirely well in about

eight weeks" and that the claimant would be able to resume his daily occupation "in not to exceed eight weeks at the very outside." Plaintiff's lost wages for this period would have been about $64, and settlement was made and release was executed for the consideration of $75. It later developed that the plaintiff's right shoulder was dislocated and fractured. The lower court sustained a demurrer to a bill in equity to set aside this release on the ground of either fraud or mistake. This Court, in an opinion by Judge Lurton, reversed the lower court and held the bill sufficient. The substance of the holding was that if the defendant's surgeon knew or suspected the injury to the shoulder and failed to reveal this to the injured man, this amounted to a fraud; but if he was in good faith mistaken in making his statement as to the injured man's condition, this amounted to a mutual mistake. The Court held either sufficient to avoid the release.

In the **Lumley** case it was said "that the terms of the release in question are sufficiently comprehensive to prevent a recovery for any of the injuries which may have been sustained by the complainant," but that from the allegations it appeared that the parties had taken into consideration only the injuries which the surgeon found and the time which the injured man would probably lose as a consequence thereof. Judge Lurton in disallowing the contention of the defendant that the statements of the physician were merely expressions of opinion, said:

> "To say to him that the pain of which he complained was sympathetic and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud" (p. 70).

It is to be noted that clearly the statements made in the **Lumley** case are in the same category as those made by Dr. Hendrix in the case at bar. It is impossible to distinguish the cases except to say that in the **Lumley** case

the doctor predicted when the injured man would be able to go back to work while in the case at bar Dr. Hendrix pronounced that Ervin Camp was then able to go back to work. If any distinction, therefore, is to be made, there is stronger ground for avoiding the release in the case at bar than there was in the **Lumley** case.

The question was reconsidered and the **Lumley** case reviewed and approved in **Southern Ry. Co. v. Clark**, 233 Fed. 900 (C. C. A. 6).

The opinion of Judge Sanborn in **Chicago & N. W. Ry. Co. v. Wilcox**, 116 Fed. 913 (C. C. A. 8), is strongly relied upon by petitioner. In that case one of the issues of fact was whether the defendant's doctor had told an injured plaintiff that she would be well within a year or whether he had merely told her that she would not be able to do anything for at least a year and "that there was no certainty of her ever entirely recovering." The Circuit Court of Appeals of the Eighth Circuit unanimously held that the doctor gave the injured plaintiff no assurance as to her recovery and for that reason the release could not be avoided. Judge Sanborn, however, went further and held that even if the doctor made the statement to the plaintiff that she would be well within a year this was a mere expression of opinion which could not be the basis of avoidance of the release. From this Circuit Judge Thayer dissented, saying:

> "I do not concur in the view which is further expressed in the opinion in chief, that the statement imputed to Dr. Thompson, even if it was made and relied upon, would not suffice to invalidate the settlement because it was a mere opinion or prophecy. I conceive that if Dr. Thompson, for the purpose of inducing a settlement favorable to the defendant company, did advise the complainant that she would doubtless be well within a year, when he had no expecta-

tion that she would recover, and the complainant, in reliance upon his superior professional knowledge, was thereby induced to make the settlement, it might and ought to be vacated by a court of equity, notwithstanding the fact that the advice so given was in the nature of an opinion or prophecy." (pp. 919-920.)

In **Lion Oil Refining Co. v. Albritton,** 21 Fed. (2d) 280 (C. C. A. 8), the Eighth Circuit Court in effect receded from the extreme position it had taken in the **Wilcox** case. While in the opinion Judge Kenyon cited the **Wilcox** case as authority for the rule that the proof must be clear, unequivocal and convincing, he held that facts no stronger than the plaintiff's testimony in the **Wilcox** case were sufficient to justify the avoidance of the release. The defendant's doctor had told the plaintiff, who was burned by a backfire from a furnace, that his "eyes had not been injured by the burn." Relying upon this statement the plaintiff made a settlement for a sum "being largely compensation for lost time." It later developed that the optic nerve of one of the plaintiff's eyes had been affected. The Court held that if the statements of the doctor were fraudulently made the release was avoidable on the ground of fraud, and if innocently made the release would be set aside on the ground of mutual mistake.

Among other courts that have disapproved the **Wilcox** case is the Second Circuit, speaking through Judge Learned Hand in **Scheer v. Rockne Motors Corporation,** 68 Fed. (2d) 942 (C. C. A. 2). In that case the defendant who obtained the release told the injured plaintiff "that her injuries were not serious and that she would be about again in a few weeks." The plaintiff's own doctor "testified that though he told her that her back was broken, he, too, assured her that she would be able to leave the hospital in a few weeks." The argument was made that

these were mere expressions of opinion. Judge Hand, however, held "there was evidence to justify setting aside the release." He added:

> "These assurances are much more positive than those before the court in Chicago & N. W. Ry. Co. v. Wilcox, 116 Fed. 913."

It is difficult to agree with this statement in view of the fact that the plaintiff in the **Wilcox** case had testified that the doctor made to her the positive statement "that there was no doubt but that she would be well in a year." Judge Hand, however, did not rest the matter there, but still speaking of the **Wilcox** case, added:

> "The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent. Steele v. Erie R. R. Co. (D. C.), 54 F. (2d) 688; affirmed 54 F. (2d) 690 (C. C. A. 2). Cf. Great Northern Ry. v. Fowler, 136 F. 118 (C. C. A. 9)." (p. 945.)

Judge Hand continued:

> "There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts. To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood. Of course, the sufferer may be told all the facts and the forecast put to him strictly as such; so that he will know it to be no more than the declarant's prognosis. We may assume arguendo that that would not support a rescission" (p. 945).

Those who know Judge Hand and have followed his opinions fully realize the precision of his language. It is

noteworthy that in the quotation above given he puts the situation thus:

> "It is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

Then with entire accuracy he says:

> "Of course, the sufferer may be told all the facts and the forecast put to him strictly as such; so that he will know it to be no more than the declarant's prognosis."

In these two sentences Judge Hand correctly states all the law. In the absence of a careful explanation to a claimant that future developments are uncertain and that he is being given only an opinion which may or may not be correct, a statement that he is OK or able to go back to work, or any such similar statement, is one as to a present fact.

If the test inherent in this language is applied, all the cases except possibly the discredited **Wilcox** case can be entirely reconciled.

In **Atlantic Greyhound Lines v. Metz**, 70 Fed. (2d) 166 (C. C. A. 4), the Court, speaking through Judge Parker, held that notwithstanding the fact that a release "was general and broad enough to cover all injuries sustained," it was avoidable on the ground of mutual mistake when "both plaintiff and the claim agent were entirely ignorant of the serious abdominal injuries which plaintiff had sustained."

The question came before the Circuit Court of Appeals for the Ninth Circuit in **Great Northern Ry. Co. v. Fowler**, 136 Fed. 118 (C. C. A. 9). The defendant's physician in that case diagnosed the plaintiff's injuries and stated that "he was practically well and would be able to go to work in a week or two." Thereupon settlement was made which

consisted largely of an amount sufficient to compensate plaintiff for doctor's and nurses's bills and lost wages. The doctor much more nearly expressed an opinion in that case than in the case at bar, because in a blank which he filled out, the following questions were answered:

> "Will any permanent injury or deformity result? If so, what?—I think not."

Again:

> "How long will the plaintiff be disabled?—He will probably be able to work in two weeks."

It will be noted that in the **Fowler** case the doctor merely stated that he thought no permanent injury or deformity would result, whereas Dr. Hendrix told Camp that he was OK. It is also to be noted that in the **Fowler** case the doctor did not state that the plaintiff was then able to go back to work but merely stated that he would "**probably** be able to work in two weeks." (Emphasis supplied.) In the **Fowler** case it developed that the plaintiff had an injury to his brain and nervous system which was serious and resulted in traumatic neurosis. The Court said that

> "The evidence in the case convinced the trial court, as it convinces us, that the settlement was made under a mutual mistake of both parties thereto as to the nature and extent of the appellee's injuries" (136 Fed. at p. 120).

Judge Gilbert, who wrote the opinion, cited the **Lumley** case, saying:

> "A case directly in point is Lumley v. Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60, decided by the Circuit Court of Appeals for the Sixth Circuit" (136 Fed. at p. 121).

Judge Gilbert also adopted the following language of **Houston & T. C. R. Co. v. Brown,** 69 S. W. 651 (C. C. A. of Texas), in disallowing the contention that the doctor's statements were a mere expression of opinion:

> "We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart was a mere expression of opinion. It was more than an opinion. It was the statement of a fact. * * * It is true, this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside, if he was misled by the statement, and executed the release, believing the statement was true. In such a case, innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false" (p. 652).

The Ninth Circuit went even further in **Robert Hind, Limited, et al. v. Silva,** 75 Fed. (2d) 74 (C. C. A. 9). In that case the release, while general, discharged the defendant "from all claims, demands, damages, actions or causes of action, on account of injuries resulting, or to **result,**" from the action. (Emphasis supplied.) The injured person was attended by "his own physician." This physician testified there was evidence of a bruise over the right sacroiliac region and other minor abrasions. Other than that he found no serious injury. The plaintiff's physician was informed by his doctor that he was able to return to work, and he did so. The amount paid for the release represented the wages lost by the plaintiff as a result of his disability. It later developed that the plaintiff was much more seriously injured because of a recurrence of

the original back injury. The argument made by the defendant, as here, was

> "* * * that the evidence shows there was no mistake as to the facts of the injury, that is, as to what injury was suffered, and argues 'that the only situation that justifies cancellation of a release on the ground of mutual mistake of fact is where there was an unknown injury that was not taken into consideration at the time of the settlement.' The only mistake in this case, continues appellant, 'was as to the seriousness, or severity, of the injury,' and, it is argued, 'such a mistake is a mistake of opinion or prophecy which does not justify cancellation of a release' " (p. 77).

The Court disallowed this argument, holding that

> "The release was executed under a mutual mistake as to a present and existing fact which it is uniformly held justifies the cancellation of a release. * * * A statement by a physician that a patient has fully recovered from an injury received in an accident is a representation concerning an existing fact. * * * It was not a mistake in prophecy or opinion or in a belief relative to an uncertain future event" (p. 77).

While holding that the case he was dealing with was not such a case, Circuit Judge Wilbur recognized, as did Circuit Judge Learned Hand in **Scheer v. Rockne Motors Corporation**, supra, that it was possible when such an intention existed, for the parties to compromise in circumstances under which the person executing the release voluntarily assumed the risk of future developments. In this connection he said:

> "It was not in reality a compromise entered into on account of uncertainty involved as to the future effect of the accident" (p. 77).

**Steele v. Erie R. Co.**, 54 Fed. (2d) 688 (D. C. W. D. N. Y.), was a case tried under the Federal Employers' Liability Act by the judge without a jury. It was held that there was a mutual mistake when the attending physician stated to the plaintiff "that he would be relieved of his injury in a couple of weeks and that there was no reason to fear any complications," whereas in fact the period of disability was much longer. The Court distinguished the facts in that case from those involved in the **Wilcox** case and cited with approval the **Lumley** case and **Great Northern R. Co. v. Fowler**, supra. Particular stress was laid upon the fact that the amount of the settlement was consonant with the shorter but not with the longer period of disability. This case was affirmed by the Circuit Court of Appeals for the Second Circuit in 54 Fed. (2d) 690 (C. C. A. 2).

See also **Montgomery Ward & Co. v. Callahan**, 127 Fed. (2d) 32 (C. C. A. 10); **Tulsa City Lines, Inc., v. Mains**, 107 Fed. (2d) 377 (C. C. A. 10).

The cases from the State courts of last resort are too numerous to permit extended quotations from all of them. We shall refer to a few, for illustrative purposes, giving the language which was held to be a statement of a present fact, and cite the others:

"Her injuries were very slight and that she would be well and at work within two or three days." **Clark v. Northern Pacific Ry. Co.**, 36 N. D. 503, 162 N. W. 406. "The physician had told him (the plaintiff) to go to work and to work his hand, and it would be all right." **Wolf v. Cudahy Packing Co.**, 105 Kan. 317, 182 Pac. 395. Language almost identical with that here involved: "He was all right and OK to go to work; for him to see Mr. Carlson (defendant's claim agent) and get things straightened up and go to work." **Rider v. Kansas City Terminal Ry.**

**Co.**, 112 Kan. 765, 212 Pac. 678. "That he was all right, he can go back to work." **Koshka v. Missouri Pac. R. Co.**, 114 Kan. 126, 217 Pac. 293. "That there was nothing seriously wrong and that he would be all right in thirty days." **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406. "That his foot would be well in two or three weeks." **Missouri, K. & T. Ry. Co. of Texas v. Maples**, 162 S. W. 426 (C. C. A. of Texas). "We think the statement that appellee's leg 'was all right and was well' ought not to be construed as the opinion merely of the surgeon." **Misouri, K. & T. Ry. Co. of Texas v. Haven**, 200 S. W. 1152 (C. C. A. of Texas).

See also **St. Louis & S. F. R. Co. v. Richards**, 23 Okl. 256, 102 Pac. 92; **Ladd v. Chicago, R. I. & P. Ry. Co. et al.**, 97 Kan. 543, 155 Pac. 943; **Chicago, R. I. & P. Ry. Co. v. Rogers**, 60 Okl. 249, 159 Pac. 1132; **Smith v. Kansas City**, 102 Kan. 518, 171 Pac. 9; **Bidnick v. Armour & Co.**, 113 Kan. 277, 214 Pac. 808; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen**, 112 Okl. 256, 241 Pac. 188; **St. Louis Southwestern R. Co. v. Thomas**, 244 S. W. 839 (C. C. A. of Texas).

*Rationale of the Decisions.*

From the beginning the courts almost without exception have recognized that it was inequitable to sustain releases taken under circumstances similar to those existing in the case at bar.

A great many of the early cases invalidated such releases by extending the doctrine of fraud to cover such situations. Some held that even though the statement that the plaintiff was well or would soon be well was innocently made, this was constructive fraud, or fraud in law. **Clark v. Northern Pacific Ry. Co.**, 36 N. D. 503, 162 N. W. 406; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen**, 112 Okl. 256, 241 Pac.

188; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples,** 162 S. W. 426 (C. C. A. of Texas); **Missouri, K. & T. Ry. Co. of Texas v. Haven,** 200 S. W. 1152 (C. C. A. of Texas). Others made the statement of the doctor that of the defendant, when it was repeated to or adopted by the claim agent. **Lumley v. Wabash R. Co.,** 76 Fed. 66 (C. C. A. 6); **Southern Railway v. Clark,** supra; **Scheer v. Rockne Motors Corporation,** supra; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples,** 162 S. W. 426 (C. C. A. of Texas).

In one instance at least, in holding the release avoidable, the Court held that a doctor who represented an association such as the one mentioned in this record, but who had a pass given him by the railroad company, and who reported to the claim office of the company, was in fact the defendant's physician and not that of the plaintiff, so that the defendant was responsible for any representations made by him. **Missouri, K. & T. Ry. Co. of Texas v. Haven,** 200 S. W. 1152 (C. C. A. of Texas).

Cases of this nature show the effort of the court to arrive at the justice of the situation by an extension of the doctrine of fraud.

Most of the later cases, however, set aside the releases on the ground of mutual mistake. Some of these then proceed on the theory that the release in question did not purport to cover the injury which later developed. Others make a distinction between cases where the later injury had not been discovered at the time the release was originally taken, and cases where the subsequent developments were merely unexpected and unanticipated consequences of the original injury. **Southern Railway v. Clark,** supra; **Lumley v. Wabash R. Co.,** supra; **Scheer v. Rockne Motors**

**Corporation,** supra; **Lion Oil Refining Co. v. Albritton,** supra.

The most recent and best considered cases, however, squarely meet the issue by holding that a statement made by a doctor (such as that of Dr. Hendrix) is without more a statement of a present existing fact. (See cases cited and discussed supra.) In this connection both fraud and mistake cases are in point in determining the basic question of whether such a statement is of a present fact or is merely an expression of opinion as to the future. They differ only in the effect given the statement. If it is knowingly incorrect, fraud is present, while if it is innocently made and acted upon by both parties, there is clearly a mutual mistake (**Lumley v. Wabash R. Co.,** supra; **Lion Oil Refining Co. v. Albritton,** supra; **Great Northern R. Co. v. Fowler,** supra; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen,** 112 Okl. 256, 241 Pac. 188; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406), even in those jurisdictions which do not go so far as to hold that such an innocent misrepresentation is constructive fraud or fraud in law.

When relief is sought upon the ground of mutual mistake it is, of course, immaterial whether the doctor is the physician of the plaintiff or the defendant, if his innocent misstatement is the cause of the mutual mistake (**Scheer v. Rockne Motors Corporation,** supra; **Robert Hind, Limited, et al. v. Silva,** supra), and inasmuch as the mutual mistake invalidates the entire agreement it is unimportant whether the undiscovered injury is distinct from the injury of which the parties knew or is a subsequent unexpected and more serious development of the known injury. **Scheer v. Rockne Motors Corporation,** supra; **Lion Oil Refining Co. v. Albritton,** supra; **Great Northern R. Co. v. Fowler,** supra; **Robert Hind, Limited, et al., v. Silva,** supra; **Steele v. Erie Railroad Co.,** supra; **Wolf v. Cudahy Pack-**

**ing Co.**, supra; **Rider v. Kansas City Terminal Ry. Co.**, 112 Kan. 765, 212 Pac. 678; **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples**, 162 S. W. 426 (C. C. A. of Texas); **Missouri, K. & T. Ry. Co. of Texas v. Haven**, 200 S. W. 1152 (C. C. A. of Texas).

For the same reason it becomes unnecessary for the plaintiff to contend that the release does not purport to cover the new development. Since the entire release falls, it is immaterial what it purports to cover. **Lumley v. Wabash R. Co.**, supra; **Atlantic Greyhound Lines v. Metz**, 70 Fed. (2d) 166 (C. C. A. 4).

The language of the release is considered only as a circumstance tending to show the intention of the parties. While unexplained, such a statement as that of Dr. Hendrix is of a present existing fact, it is open to the defendant to prove that neither it nor the plaintiff were misled to act by a mistaken reliance upon the correctness of the statement, but that the plaintiff clearly intended to take the risk of all future developments. In this connection the language of the release is pertinent (e. g., **Sitchon v. American Export Lines**, 113 Fed. [2d] 830 [C. C. A. 2]), although not controlling, for the question is one of fact to be determined from all the evidence; and even though the release recites that it is not obtained in reliance upon a statement or representation by any doctor, this is not conclusive upon the plaintiff's right to avoid it. **Bidnick v. Armour & Co.**, 113 Kan. 277, 214 Pac. 808; **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406. See generally 13 **Indiana Law Journal** 590; **Wigmore on Evidence**, Sec. 2416; 28 **Columbia Law Review** 893; **Restatement of Contracts**, Sec. 504, Illus. 4.

Applying these principles to the instant case it clearly appears:

Doctor Hendrix' statement that Camp was O. K. and able to go back to work was the statement of a present existing fact. As we have already pointed out in our statement of the case and argument heretofore made, this statement, although erroneous, was accepted and acted upon by both parties and was the producing cause of the release, which thus was executed as the result of a mutual mistake. Under the rule of **Missouri, K. & T. R. Co. v. Haven,** supra, Dr. Hendrix (who disclosed a primary loyalty to the defendant) could have been held to be its employees. This, however, is immaterial inasmuch as mutual mistake is the question involved. It is equally unimportant whether the unexpected future development was a distinct injury from the one known, or a development that had been negatived by the statement of the doctor, and whether the language of the release is broad and general enough to cover future developments. While these things may be considered in determining whether Camp and the Claim Agent were settling as a result of the statement of the doctor that Camp was O. K. and able to go back to work, or were settling with the conscious recognition on the part of Camp that he was not O. K. and not able to go back to work, and was taking the risk of any future developments, the entire evidence shows that the advisory jury, the District Judge and the Circuit Court of Appeals were well warranted in finding, regardless of both of these facts, that the settlement was induced, both on the part of Camp and on the part of the Claim Agent, by Dr. Hendrix' statement that Camp was O. K. and able to go back to work. This being true, the case is obviously one of mutual mistake and the entire release, regardless of its language, must fall. Therefore, it cannot possibly be said that it was "clear error" for the advisory jury, the District Judge and the Circuit Court of Appeals so to find; indeed, it is difficult to see how any different conclusion could be reached.

**EVIDENCE OF THE CHARGE MADE BY AN INSURANCE COMPANY FOR AN ANNUITY WITHOUT REFUND WAS ADMISSIBLE IN EVIDENCE.**

The petition for certiorari seeks review of the action of the Circuit Court of Appeals in affirming the action of the District Court in receiving evidence of the charge made by an insurance company for an annuity without refund applicable to a person of the approximate age of Ervin Camp.

It is our understanding that an annuity is actually the present cash value of payments distributed over a term of years—this and nothing more. Mrs. Camp testified that Ervin Camp was thirty-three years of age and was earning about $250.00 a month (R. pp. 57-59). His life expectancy was 33.2 years. Mrs. Camp further testified that practically all of the earnings of Camp were necessary for the support of his family (R. p. 59).

The evidence complained of was that of the witness Pritchett of the cost of an annuity of $3,000.00 a year without refund for a man forty years of age (R. pp. 285 et seq.). The total cost of such an annuity was stated to be $74,520.00 (R. p. 287). The verdict of the jury in favor of respondent was in the amount of $35,000.00 (R. p. 572).

There are four conclusive answers to this unsubstantial point of evidence asserted by petitioner:

1. The evidence was properly admitted. See the authorities cited by the Circuit Court of Appeals in its opinion on this point (R. pp. 613-14), especially **Vicksburg and Meridian R. Co. v. Putnam**, 118 U. S. 545, 30 L. Ed. 257; **Baltimore & O. R. Co. v. Henthorne**, 73 Fed. 634, 641 (C. C. A. 6)—opinion by Judge Taft.

As we read **Goodhart v. Pennsylvania R. Co.**, 177 Pa. 1, 35 A. 191, relied upon by petitioner, it does not hold con-

trary to the rule of admissibility because there the annuity did not, as in this case, represent the present cash value of the earnings or contributions.

2. In defining damages the Court charged the jury that they were "the present cash value of plaintiff's pecuniary loss, which is the amount you award" (R. p. 562). This charge more than abundantly protected petitioner. **Louisville & N. R. Co. v. Holloway**, 246 U. S. 525, 62 L. Ed. 867; **Western & A. R. Co. v. Hughes**, 278 U. S. 496, 73 L. Ed. 473. The objection to the evidence of the cost of an annuity was general, but the court voluntarily stated in overruling the objection that the testimony was not controlling but could merely be considered (R. pp. 285-86). When an objection is thus general and the testimony is admissible for any purpose, no matter how limited, it is not error to receive it. **Pennsylvania Co. v. Sheeley**, 221 Fed. 901 (C. C. A. 6); **Erie R. Co. v. Shomer**, 171 Fed. 798 (C. C. A. 6); **Hollweg v. Schaefer Brokerage Co.**, 197 Fed. 689 (C. C. A. 6); **Burton v. Driggs**, 20 Wall. 125.

3. In actions under the Federal Employers Liability Act, rulings on the admissibility of evidence are normally left to the sound discretion of the trial judge, and since there is ample evidence to support the jury's verdict apart from the testimony as to an annuity complained of, it is not necessary for this Court to determine whether the discretion of the trial judge was abused. **Lavender v. Kurn**, 327 U. S. 645, 654, 90 L. Ed. 916, 923.

4. Error in the admission of testimony as to the annuity, if any, was at best technical error not affecting the substantial rights of the parties, and therefore would not, under the "harmless error statute" (Sec. 269 of the Judicial Code as amended; 28 U. S. C. A., Sec. 391; Act of February 26, 1919, c. 48, 40 Stat. 1181) form the basis of review and reversal by this Court. See extended discus-

sion of the scope and application of the "harmless error statute" in a civil case in Petition for Certiorari and Supporting Brief, filed herein by respondent as petitioner.

## CONCLUSION.

Since there is no showing by petitioner that this Court should disturb the concurrent findings of the District Court and the Circuit Court of Appeals that the release executed by Ervin Camp should be rescinded because of mutual mistake of fact on the part of Camp and his employer, since the legal basis for such rescission is plain, since there was no error in the admission of evidence of the charge made by an insurance company for an annuity without refund which can form the basis of review and reversal herein, and since the questions raised by the petitioner are unsubstantial, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Respondent, Louise Camp,
Administratrix of the Estate of Ervin
Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.